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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN RE CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,
Petitioners

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,
Real-Parties In Interest

ON PETITION FOR A WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11) TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE HON. JAMES R. BROWNING, AND WILLIAM C. CANBY, JR., CIRCUIT JUDGES, AND ROBERT J. KELLEHER, SENIOR DISTRICT JUDGE SITTING BY DESIGNATION

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11)

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QUESTION PRESENTED
ON PETITION FOR WRIT OF MANDAMUS
AND WRIT OF CERTIORARI
UNDER RULE 11 OF THE U.S. SUPREME COURT

I

Whether, the Huffman abstention doctrine is to be applied differently from other abstention doctrines; that is, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), must the United States District Court defer to the state court judicial system and dismiss for lack of subject matter jurisdiction the federal civil rights action of a State of Nevada citizen which seeks to enjoin enforcement of a quasi-judicial order of the Henderson City Council, sitting as a hearing board for the State of Nevada; which revoked the federal plaintiffs' business license to do business in Henderson, Nevada, based on the City Council's finding of a fraudulent business license application; which

order was pending in the state system and had been issued and served, but stayed for 10 days to permit an appeal to the Nevada State District Court; during which stay the Nevada citizen filed a civil rights lawsuit for an injunction under 42 U.S.C. Section 1983 in which the federal plaintiffs did not make any effort to plead and prove the requisite "extraordinary circumstances," nor did the United States District Court require that said issue be considered; the lack of which the City of Henderson pleaded as a defense on a motion to dismiss for lack of subject matter jurisdiction under the Eleventh Amendment and this Court's abstention ruling in Huffman, supra.

II

Whether an Opinion expressing a unanimous decision of the Court of Appeals for the Ninth Circuit:

(1) that the principles of law

expressed by Chief Justice Rhenquist in Huffman v. Pursue, Ltd. control and that the abstention doctrine applies to the facts set forth; and

(2) that the federal plaintiffs have not stated a cause of action which establishes subject matter jurisdiction for a federal injunction under 42 U.S.C. Section 1983; and

(3) that the cause of action must be dismissed for lack of subject matter jursidiction; and

(4) in which the Court has made findings of fact and conclusions of law and entered a Judgment thereon, in a written Opinion which the Court has certified for publication as meeting the federal standards set forth in Rule 36 of the Federal Rules of Appellate Procedure and which has been published as 8

F.3d 1348 (CA 9, 1993);

may thereafter be withdrawn by the Court without providing a good and lawful reason?

III

Whether the Ninth Circuit Court of Appeals Order dated April 7, 1994 reading "The petition for rehearing is granted. The opinion reported at 8 F.3d 1348 (CA 9 1993) is withdrawn" is void for: (1) "lack of subject matter jurisdiction," and (2) its failure to give <u>any</u> reason for the withdrawal?

IIIa

Whether a writ of mandamus will lie to require that the April 7, 1994 Order be vacated as a void order?

IV

Whether the Ninth Circuit Court of Appeals Memorandum, dated May 4, 1994, is also void because of (1) lack of subject matter jurisdiction, and (2) it also does not address the underlying issue that the Opinion and Judgment on November 2, 1993 may not be withdraw except for a "good and lawful reason"?

IVa

Whether a writ of mandamus will lie to require that: (1) the Court of Appeals' May 4, 1994 Memorandum be vacated as a void Order, and (2) the November 2, 1993 Opinion and Judgment be reinstated?

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SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11)

INTRODUCTION

Pursuant to Rule 15.7 of the United States Supreme Court Rules, Petitioners City of Henderson, a Nevada Municipal Corporation and James Goff, Chief of Police of the City of Henderson

(hereinafter "City of Henderson"), file this Supplemental Brief to their Petition for a Writ of Mandamus under Rule 20 (or Certiorari under Rule 11). This Supplemental Brief addresses itself to the following intervening matters and new cases not available at the time of the filing of said Petition on June 6, 1994.

STATEMENT OF FACTS SUBSEQUENT TO DATE OF FILING OF PETITION FOR WRIT OF MANDAMUS UNDER RULE 20 AND PETITION FOR WRIT OF CERTIORARI UNDER RULE 11.

1. On June 6, 1994, a Petition for Writ of Mandamus (or Certiorari Under Rule 11) to the United States Court of Appeals for the Ninth Circuit was filed in the United States Supreme Court, In re City of Henderson, a Nevada Municipal Corporation, James Goff, Chief of Police of the City of Henderson, v. Nevada Entertainment Industries, Inc., a Nevada Corporation and Daniel Bishop, No. 93-1969.

2. On June 2, 1994 an application for: (1) an ex parte order to show cause

and (2) an ex parte order advancing the date set for the filing of briefs in opposition to the Petition for Writ of Mandamus or Certiorari under Rule 11 was transmitted by Express Mail to the U.S. Supreme Court but became separated from the Petition for Writ of Mandamus in the Clerk's Office and was returned to Petitioner, for lack of a supporting record on June 8, 1994. See copy at Appendix 1 to this Supplemental Brief.

3. On or about June 13, 1994, an amended application for: (1) an ex parte order to show cause and (2) an ex parte order advancing the date set for the filing of briefs in opposition to the Petition for Writ of Mandamus was transmitted by Express Mail to the Clerk of the U.S. Supreme Court. See copy at Appendix 2 to this Supplemental Brief. On June 14, 1994, in a phone conversation in relation to this pleading, the Clerk's Office informed the Counsel of Record that

matters of this nature should go to the entire Court under Rule 21.

4. On June 14, 1994 the Court of Appeals for the 9th Circuit filed an order denying the City of Henderson's Petition for Rehearing filed on May 18, 1994. See copy at Appendix 3 to this Supplemental Brief.

5. On June 15, 1994, the Amended Application for an ex parte order shortening time, addressed to Associate Justice Sandra Day O'Connor, was presented to Justice O'Connor who, on June 15, 1994, endorsed thereon the following: "Denied Sandra Day O'Connor 6/15/94." See copy at Appendix 4 to the Supplemental Brief.

6. On June 17 1994, the City of Henderson filed a Motion for Leave to File Second Petition for Rehearing, and a Second Petition for Rehearing in the Court of Appeals for the 9th Circuit under Federal Rules of Appellate Procedure, Rule 40(a) (based upon newly decided authorities: Kokkonen v. Guardian Life

Ins. Co. of America, 54 CCH S.CT. Bull. p.B 1724, decided by the U.S. Supreme Court on May 16, 1994. See copy at Appendix 5 to this Supplemental Brief.

7. On or about June 17, 1994, Nevada Entertainment Industries filed its Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit.

8. On June 17, 1994, the City of Henderson filed a Motion for Order Staying Mandate in the Court of Appeals for the 9th Circuit. See copy at Appendix 6 to this Supplemental Brief.

9. On or about June 21, 1994, the City of Henderson filed a Motion for Order to Show Cause in Opposition to Petition for Writ of Mandamus in the U.S. Supreme Court, as per the Clerk's instructions on June 14, (supra). See copy at Appendix 7 to this Supplemental Brief.

10. On June 25, 1994, the City of Henderson sent a transmittal letter to the Clerk of the Court together with an

application to be submitted to Associate Justice Anthony M. Kennedy, after denial of the same by Associate Justice Sandra Day O'Connor on June 15, 1994, and an additional Memorandum of Law for Justice Kennedy. See copy of the transmittal letter and Application to Associate Justice Kennedy and Memorandum of Law at Appendix 8 to this Supplemental Brief.

11. On July 11, 1994, the Court of Appeals for the 9th Circuit filed an order denying Nevada Entertainment Industries' Petition for Rehearing, and the City of Henderson's (1) Motion for Leave to File a Second Petition for Rehearing, and (2) Motion for Order Staying the Mandate. See copy at Appendix 9 to this Supplemental Brief.

12. On July 25, 1994, the Court of Appeals for the 9th Circuit filed an Order granting Nevada Entertainment Industries' Motion to Stay the Mandate pursuant to Rule 41(b). See copy at Appendix 10 to this Supplemental Brief.

13. On August 12, 1994, the City of Henderson filed a Motion for Order Extending Stay of Mandate together with a supporting declaration and Joint Stipulation of the Parties and Memorandum of Points and Authorities with the Court of Appeals for the Ninth Circuit. See copy at Appendix 11 to this Supplemental Brief.

14. On August 24, 1994, the Court of Appeals for the 9th Circuit filed an order extending the Stay of Mandate to October 12, 1994. See copy at Appendix 12 to this Supplemental Brief.

STATEMENT OF THE CASE

On November 2, 1993, the Ninth Circuit Court of Appeals [Browning and Canby, Circuit Judges, Kelleher, Senior District Judge] filed its opinion in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, 8 F.3d 1348 (argued and submitted May 10, 1993 and decided November 2, 1993) in which it awarded judgment to the City on its

cross-appeal. The City of Henderson's cross-appeal had argued: (1) that the United States Supreme Court's opinions in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) controlled the disposition of this appeal; and (2) that the Younger-Huffman abstention doctrine was predicated upon the 200 year old Eleventh Amendment and Anti-Injunction Statute, which required a dismissal for lack of "subject matter jurisdiction" and vacation of the District Court's Injunction of 4-years duration which had wrongfully prevented the City Council's quasi-judicial order of license revocation from being implemented.

However, on April 7, 1994, the Nevada Entertainment Industries panel withdrew its November 2, 1993 opinion upholding Huffman-Younger abstention, and on May 4, 1994, filed a memorandum decision holding the Younger abstention issue to be moot!

In this Petition for Writ of Mandamus, the City of Henderson contends that the Court's actions on April 7 and May 4 constitute a usurpation of the judicial power, and are void.

Recent decisions of the Ninth Circuit underscore the immediate need for this Court to undertake a definitive analysis of the meaning of Huffman-Younger Abstention, and resolve the present split of authorities for the future guidance of all federal trial courts.

REASONS FOR GRANTING THE WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11)

I

THE DUBINKA AND WIENER OPINIONS DECIDED APRIL 8, 1994 AND MAY 2, 1994 CLEARLY ESTABLISH THAT THERE IS A SPLIT OF AUTHORITY ON THE NINTH CIRCUIT AS TO THE MEANING OF HUFFMAN-YOUNGER ABSTENTION.

One day after the Nevada Entertainment Industries panel withdrew its November 2, 1993 opinion which had upheld Huffman-Younger Abstention, another Ninth Circuit panel (Fletcher, Pregerson and Hall) filed its opinion in Dubinka v.

Judges of the Superior Court, 23 F.3d 218 (argued and submitted December 8, 1993) involving the Feldman and Younger doctrines, as those doctrines implicate the "subject matter jurisdiction" question, which the City of Henderson claims is and has been the central issue in its cross-appeal herein. The City claims that the April 8, 1994 opinion in the Dubinka case correctly analyzes those three issues [Feldman doctrine, Younger abstention, and "lack of subject matter jurisdiction"], is apposite on this petition for writ of mandamus, and should require that the Court of Appeals (Browning, Canby, Kelleher) November 2, 1994 opinion and judgment in Nevada Entertainment Industries, supra: (1) be reinstated, and (2) amplified to include a resolution of the "subject matter jurisdiction" issue as was undertaken in the Dubinka case.

Four weeks later, a third Ninth Circuit panel filed a contrary analysis in

Wiener v. County of San Diego, 23 F.3d 263 [Browning, Pregerson, and Brunette, argued and submitted April 5, 1994, and decided May 2, 1994] involving the Younger abstention issue. That opinion did not undertake an analysis of the "subject matter jurisdiction" issue, and presents an entirely different view as to the "meaning" of the Younger-Huffman Doctrine. In Wiener, the Court of Appeals panel reversed the trial court's judgment, which had denied Wiener's motion for a preliminary injunction and dismissed the case upon the grounds of Younger abstention. Judge Browning sat in both the City of Henderson and Wiener appeals.

The City of Henderson claims that the analysis in Wiener v. Counties of San Diego is in error for the same reason the City of Henderson opinion is in error, in failing to apply the law expressed in Watson v. Buck, 313 U.S. 387 (1941). Younger abstention should have controlled, in that such "new" legislation had not yet

been interpreted by the state judiciary and the trial court's judgment of dismissal upon abstention grounds in Wiener should have been upheld.

In this regard, the City of Henderson contends that the same principle controls both Henderson and Wiener: one of the perquisites flowing from state sovereignty and the Eleventh Amendment is the right:

(1) to enact legislation on behalf of the state government;

(2) to have such new legislation interpreted for the first time by a state court which is charged with the duty to give such legislation a constitutional interpretation and save such legislation where possible; and

(3) where possible, not to be burdened by the cost of duplicate litigation of the same issue in two different courts. One positive advantage of this Proposition of Law, as stated, is that it assigns priorities and does away

with the confusion which is presently generated in the race to the Courtroom.

II

WIENER V. COUNTY OF SAN DIEGO, 235 F.3d 263 WAS WRONGLY DECIDED.

The Wiener case was wrongly decided. In that appeal, the federal panel (Browning, Pregerson and Brunetti) on May 2, 1994 (two days before the May 4th action in this case), reversed the trial judges conclusion that Huffman abstention applied to the facts, due to the neglect of the County Counsel to focus upon the Eleventh Amendment, the Anti Injunction Statute, and Watson v. Buck, 313 U.S. 387 (1941). As a matter of law, the Huffman abstention challenge in the Wiener case should have been upheld on the basis of the Eleventh Amendment and Watson v. Buck, 313 U.S. 387 (1941), and the County Counsel's arguments appearing at page 266 of the Court's opinion:

> "By our holding, we reject the County's argument that Younger requires only that the pending state judicial proceeding concern the same

> legal issues that are raised by the federal action (e.g., validity of locational restrictions). An identity in legal issues is not a sufficient predicate to compel abstention where a plaintiff challenges a different law." (Our Emphasis.)

Even if the substitute ordinance were to be construed as a separate ordinance, it is clear that the State wanted the substitute ordinance to be given its initial interpretation by the State court, and the State had that right under the Eleventh Amendment (and would, no doubt, have exercised that right, except for the fact that the federal action was filed before the state law became effective). Watson v. Buck, 313 U.S. 387 (1941), (see Huffman 420 U.S. 592, at 600, fn. 14), bars such federal interference unless a state law is facially unconstitutional under the strictest of standards (incapable of being Constitutionally applied in every paragraph, sentence, clause, etc.).

For very practical reasons, the County was entitled to a state court adjudication of the substitute ordinance under the Eleventh Amendment, because the ordinance was new legislation which only a state court could authoritatively interpret or restrict. See U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), at 369:

> "we [the federal court] lack jurisdiciton authoritatively to construe state legislation."

and a State court has the duty to give a constitutional interpretation to a state law, if at all possible. See People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 61, 130 Cal.Rptr. 238, at 339 (1976):

> "We [the state court] are obliged to construe and interpret legislation in a manner which will uphold its validity. (Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145; In re Kay (1970) 1 Cal.3d 930, 941-942, 83 Cal.Rptr. 686, 464 P.2d 142)."

See, also, Petition for Writ of Certiorari in City of Henderson et al.

v. Nevada Entertainment Industries, Inc., No. 92-643 at pages 46-57.

Because Watson v. Buck: (1) is well known in relation to its reference in Huffman, (2) was cited and referred to in Dubinka at p 225; and (3) has been repeatedly cited to the Ninth Circuit in the City of Henderson 4 year record, it would appear that the Wiener Court's analysis should have considered the law expressed in Watson v. Buck. Instead, the Court stated at p. 267 that:

> "As Wiener states there is no reason why the California State Courts should mind if a federal court resolves his claims. We therefore agree with Wiener that the full predicate for Younger abstention was not met."

Petitioners contend that Justice Browning was remiss in his willingness to accept and support the defense counsel's self-serving misstatements re Huffman abstention. There are a great number of well understood and popular reasons why a litigant should desire that the injunction suit be decided in the state court,

including the Eleventh Amendment! See, also, Motion for Order to Show Cause in Opposition to Petition for Writ of Mandamus at Appendix 7 page 7-7 herein and Petition for Writ of Certiorari in City of Henderson, et al. v. Nevada Entertainment Industries, Inc., et al., No. 92-643, at pages 46-57.

The Wiener case is a clear example of improper federal interference in a "continuum" of state law: the interplay of two related state laws dealing with virtually the same "subject matter" [where the latter ordinance repealed and reenacted the text of a first ordinance with minor changes]. The "text" of the second State law, to which the federal civil rights plaintiff objected in its federal civil rights action, involved text identical to the State law being reviewed in the pending State court action (where the federal plaintiff was the state defendant). When an existing state law is reenacted by a later state law in

substantially the same terms, the unchanged provisions which are repeated in the new enactment are construed as having been continuously in force. See Sutherland, Stat. Const., (4th Ed.) Sections 23.28 and 23.29 and California authorities cited at fn 4 on page 407. In Wiener, the state defendant (fighting a "losing battle" in state court) sought to use 42 U.S.C. Section 1983 improperly as a device to relitigate the same "constitutional" issues in federal court, and thus prolong enforcement of the state law against their business operation and did so by filing his federal action before the amendment ordinance became effective.

The propriety of federal court interference in pending state adjudications, involving a "continuum of subject matter," is the obvious concern of Huffman-Younger. The impact of having both a federal court and a state court examine the constitutionality of identical or inextricably-related state laws, is to

set up a Constitutional "collision course."

III

IF DUBINKA IS A CORRECT STATEMENT OF THE LAW, THEN THE CITY'S CROSS APPEAL MUST BE UPHELD IN ITS ENTIRETY, PURSUANT TO THAT AUTHORITY.

The very great importance of Dubinka v. Judges of the Supreme Court of the State of California, 23 F3, 218 to this Petition for Writ of Mandamus is its definitive analysis of the "subject matter jurisdiction" issue and its holding that a federal question which is raised in a federal complaint, filed pursuant to 42 USC Section 1983, may be within the subject matter jurisdiction of the U.S. District Court as to facial challenges, under the Feldman Doctrine, see Dubinka at p 222, yet not where that same Complaint is also subject to a valid Younger-Huffman challenge, See Dubinka at p 222 et seq. See also Dubinka v. Judges of the Superior Court of the State of California, 23 F3,218 at 225 and 226 footnote 11.

CONCLUSION

Dubinka clearly establishes that the Ninth Circuit's analysis and orders in In Re City of Henderson v. Nevada Entertainment Industries Inc., (supra) on April 7 and May 4 are erroneous and inappropriate. If permitted to stand, such disparate results: Dubinka and Wiener (and Henderson) will (1) confuse the trial court's below which are faced with applying the Court of Appeals rules in resolving Huffman-Younger challenges at the trial level and will (2) invite and encourage a continuation of the same type of improper federal court filings under the Civil Rights Act. A Writ of Mandamus should issue. Further, the substantial federal question involving the Eleventh Amendment which Dubinka avoided (see fn. 11 of Dubinda) is squarely before this Court on this Petition for Writ of Mandamus.

Dated: September 16, 1994

Respectfully submitted,

James J. Clowney

Counsel of Record

APPENDIX 1

APPLICATION TO THE HONORABLE SANDRA DAY O'CONNOR, CIRCUIT JUSTICE FOR THE NINTH CIRCUIT, FOR: (1) EX PARTE ORDER TO SHOW CAUSE, AND (2) AN EX PARTE ORDER ADVANCING THE DATE SET FOR THE FILING OF BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR CERTIORARI UNDER RULE 11.

(Reference: Supplemental Brief at page 3)

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REAL PARTIES IN INTEREST

ON PETITION FOR A WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11) TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE HON. JAMES R. BROWNING, AND WILLIAM C. CANBY, JR., CIRCUIT JUDGES, AND ROBERT J. KELLEHER, SENIOR DISTRICT JUDGE SITTING BY DESIGNATION

APPLICATION FOR: (1) EX PARTE ORDER TO SHOW CAUSE AND (2) AN EX PARTE ORDER ADVANCING THE DATE SET FOR THE FILING OF BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR CERTIORARI UNDER RULE 11 TO ENABLE THIS COURT, BEFORE THE END OF THE 1993 TERM, TO EXAMINE AND CONSIDER WHETHER IT WISHES TO ACT TO ASSUME JURISDICTION OVER A SUBSTANTIAL FEDERAL QUESTION (FIRST RAISED IN JUSTICE BRENNAN'S 1975 DISSENT IN HUFFMAN v. PURSUE, LTD.) WHICH IS RIPE FOR DECISION.

TO THE HONORABLE SANDRA DAY O'CONNOR, CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Petitioners City of Henderson, a Nevada Municipal Corporation, and James Goff, Chief of Police of the City of Henderson, Nevada, through their counsel of record, respectfully move the Court for an ex parte order requiring the respondent Ninth Circuit Court of Appeals to reinstate its November 2, 1993 Opinion which is reported at 8 F.3d 1348 (CA 9, November 2, 1993) or show cause on or before June 21, 1994 why it should not be required to do so by serving and filing a response with the Clerk of this Court on that date to the substantial federal questions presented in the Petition for Writ of Mandamus or Certiorari under Rule 11 being filed concurrently with this motion.

The Court of Appeals' unanimous Opinion, in 8 F.3d 1348 reviewed the facts of record before the Court of Appeal and held at page 1350 et seq. that the law

expressed in this Court's opinions in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) and New Orleans Public Service, Inc. (NOPSI) v. City Council of New Orleans, 491 U.S. 350 (1989) set forth the principles which controlled that Court's disposition of the City's cross-appeal; namely, that the Huffman abstention doctrines [Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)] required that the 42 U.S.C. Section 1983 complaint of Nevada Entertainment Industries, Inc. et al. must be dismissed under this Court's decision in Huffman v. Pursue, Ltd., supra.

Petitioner contends that the Court of Appeals subsequent Order of April 7, 1994, and its Memorandum of May 4, 1994, are arbitrary and capricious and ultra vires, in that the Court of Appeals, having ruled that Huffman abstention applied, and required that the case be dismissed on Huffman grounds, the Court must do so on those grounds: i.e. for lack

of subject matter jurisdiction, which made any further proceedings impossible because the Court itself had no jurisdiction to act on the matter, in relation to the City of Henderson et al. acting for the State of Nevada who would no longer be properly before the Court. See Huffman v. Pursue, Ltd., supra, Brennan's dissent at footnote 1.

Two of the substantial Federal Questions (Questions I and II) which are raised in the Petition for Writ of Mandamus or Certiorari Under Rule 11 have already been presented to the Respondent Court of Appeal in a Petition for Rehearing by the City of Henderson et al. (see Appendix 7 to Petition) as to that Court's May 4, 1994 Memorandum. Real Parties in Interest Nevada Entertainment Industries, Inc. et al. have been granted an extension of time in which to file its Petition for Rehearing up to and including June 21, 1994.

Question 1 and Question 2 of the

Petition for Writ of Mandamus or Certiorari Under Rule 11, raise the important question as to the real meaning of the term "lack of subject matter jurisdiction" as that term has "meaning" in relation to the Huffman abstention doctrine. It presents a substantial federal constitutional question, not heretofore considered, which is "ripe" and should be resolved by this Court immediately, because:

(1) it is the center of a major on-going controversy between United States District Court and United States Circuit Court Judges in the Ninth Circuit, and elsewhere. See Huffman v. Pursue, Ltd., supra (Brennan dissenting, at footnote 1);

(2) is the central issue in both the City of Henderson's cross-appeal now before the Ninth Circuit Court of Appeals on the City's Petition for a Rehearing and the City of Henderson's present Petition for Writ of Mandamus and for Writ of Certiorari Under Rule 11), culminating

four years of continuing litigation on this issue; and

(3) the record below is simple and short, the issues before this Court on this Petition for Mandamus and Certiorari under Rule 11 are squarely drawn by the action which was taken by the Ninth Circuit on April 7, 1994 and May 4, 1994, and are "ripe" for review by this Court either pursuant to the Petition for Writ of Mandamus, or pursuant to the Petition for Writ of Certiorari Under Rule 11.

Questions 1 presents a substantial federal question as to a controversy before the federal judges at both the trial court and appellate court levels in relation to the real meaning of the Huffman doctrine. That conflict was drawn in focus by the concurring opinion of Associate Justice Kennedy then sitting as a Circuit Judge in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 at 1081 (CA 9, 1989) (Kennedy concurring opinion). Petitioner City of Henderson et

al. in its Petition for Writ of Mandamus on that Question contends that Justice Kennedy's interpretation is correct and is the underlying issue in its Petition for Writ of Mandamus or Writ of Certiorari Under Rule 11, and is the issue which was raised by Justice Brennan in his dissent in 420 U.S. 612, at footnote 1; namely, that in those cases in which the Huffman abstention doctrine applies, and dismissal is mandated, the dismissal is and can be based on one ground only because of its historical basis -- lack of subject matter jurisdiction, meaning the federal court has determined that it has no jurisdiction over the action before it (because jurisdiction over the matter resides in the State Court under the United States Supreme Constitution), and the "person" of the City of Henderson et al. acting for the State of Nevada, brought before the federal court, is no longer properly before the federal court. Further, it is eminently clear that the "subject matter

jurisdiction" issue has never been waived by the City of Henderson in its four years of litigation and should be answered by the Court of Appeals on the Petition for Writ of Mandamus herein, that issue is now squarely before the Court of Appeals on the City of Henderson et al.'s Petition for Rehearing.

The ex parte order shortening time is brought for the purpose of calling this Court's attention to the ripeness of the issue, so that this Court may consider whether it may wish to act to assume appellate jurisdiction of the substantial federal constitutional questions which are the subject of the Petition for Writ of Mandate, before the end of the 1993 October Term. Review by this Court of the matters raised by the Petition is urgently requested by the City of Henderson, et al., acting for the State of Nevada, because the Federal Court Injunction [enjoining the Petitioners from the performance of lawful duties imposed by

State law] has been in existence for four years and currently remains in force pending disposition of this case. Counsel for Petitioners has contacted Counsel of Record for Real Parties in Interest, who has indicated that he does not oppose Petitioners' request herein for an ex parte order shortening time.

This Court will end its 1993 October Term in about four weeks (on or about June 30, 1994) and, the Briefs in Opposition will not be due until 30 days after Respondents receipt of the Petition and this Motion and the Petition for Writ of Mandamus on file herein will not be distributed to the Court by the Clerk until receipt of such brief in opposition, which will in all likelihood occur after the Court has ended its Term. An order shortening time is necessary to permit timely distribution for this Court to act during the 1993 Term of Court.

The Petition for a Writ of Mandamus or Certiorari under Rule 11 of the United

States Supreme Court is being filed concurrently with this Motion by Express Mail posted on June 3, 1994. Service on the Respondent Court and on Counsel of Record for Real Parties in Interest is being made by Express Mail posted on June 3, 1994.

Dated: June 3, 1994

Respectfully submitted,

James J. Clancy
Counsel of Record
For Petitioners

APPENDIX 2

AMENDED APPLICATION FOR: (1) EX PARTE ORDER TO SHOW CAUSE, AND (2) AN EX PARTE ORDER ADVANCING THE DATE SET FOR THE FILING OF BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS (LESS EXHIBITS 1-6).

(Reference: Supplemental Brief at page 3)

No. 93-1969

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

IN RE CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

REAL PARTIES IN INTEREST

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE HON. JAMES R. BROWNING, AND WILLIAM C. CANBY, JR., CIRCUIT JUDGES, AND ROBERT J. KELLEHER, SENIOR DISTRICT JUDGE SITTING BY DESIGNATION

AMENDED APPLICATION FOR: (1) EX PARTE ORDER TO SHOW CAUSE AND (2) AN EX PARTE ORDER ADVANCING THE DATE SET FOR THE FILING OF BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE SANDRA DAY O'CONNOR, CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Petitioners City of Henderson, a Nevada Municipal Corporation, and James Goff, Chief of Police of the City of

Henderson, Nevada, through their counsel of record, respectfully move the Court for an ex parte order requiring the respondent Ninth Circuit Court of Appeals to reinstate its November 2, 1993 Opinion which is reported at 8 F.3d 1348 (CA 9, November 2, 1993) [see copy attached hereto as Exhibit 2 to this Application] or show cause on or before June 21, 1994 why it should not be required to do so by serving and filing a response with the Clerk of this Court on that date to the substantial federal questions presented in the Petition for Writ of Mandamus In re City of Henderson et al. v. Nevada Entertainment et al., No. 93-1969 filed on June 9, 1994 concurrently with this motion. See Peggy J. Connor v. J.P. Coleman, U.S. Circuit Judge et al., 425 U.S. 675 (1976) [see copy attached hereto as Exhibit 3 to this Application].

INTRODUCTION

A prior Application for an ex parte order to show cause, addressed to

Associate Justice Sandra Day O'Connor, together with a Petition for Writ of Mandamus, was transmitted to the Clerk of the United States Supreme Court, by express mail on Friday, June 3, 1994. On Tuesday, June 7, 1994, at 09:00 a.m., Counsel of Record for Petitioners telephoned the Clerk's Office of the United States Supreme Court and was told that the Clerk's office had no record of the prior Application, but would check further and return the telephone call. At 12:47 p.m. a Miss Jones called back to state that the Petition for Writ of Mandate had been located. Upon calling her attention to the fact that a separate Application for an ex parte Order to Show Cause, addressed to Associate Justice O'Connor, was included, Miss Jones verified receipt of the Application, and stated that the same would be given to Cynthia Rapp, who handled such matters, for processing.

On Wednesday, June 8, 1994, at 12:00

noon, Counsel of Record for Petitioners telephoned Miss Jones and was told that the Petition for Writ of Mandate would not be filed until the removal of the photo-reduced copies of certain cases, appearing at 8 F.3d 1348 (1994), 17 F.3d 1244 (1994), and 820 F.2d 1079 (1978) (which had, for the Court's convenience, been made a part of the Appendix of the Petition). These photo-reduced copies were removed from the Petition prior to 5:00 p.m. on June 8, 1994, and the Petition for Writ of Mandamus was filed on June 9, 1994, as Docket No. 93-1969.

Unfortunately, Assistant Clerk Cynthia Rapp acted on the Application for an ex parte Order To Show Cause on June 8th -- one day prior to the filing of the Petition for Writ of Mandamus -- and returned the Application to Petitioners' Counsel of Record as incomplete. A copy of the First Application and the transmittal letter of Cynthia Rapp, dated June 8, 1993, is attached hereto as

Exhibit 1 to this Application.

REASONS FOR THE WRIT OF MANDATE

Because favorable weather and an equally favorable economy have contributed to the growth of the geographical area of Henderson, Nevada (located in close proximity to Las Vegas) as an attractive place for family living and new businesses, an influx of new residents is anticipated. The City of Henderson must respond to the challenges presented by this increased expansion and urbanization.

Over half a century ago this Court broadly sustained the power of local municipalities to utilize land-use regulation in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens. See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In Young v. American Mini Theatres, Inc., 427 U. S. 50 (1976), the seminal case dealing with the regulation of adult uses through municipal zoning, Mr. Justice Powell, in

his concurring opinion, referring to Euclid, remarked

> "The Court there noted the very practical consideration underlying the necessity for the power: '[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." Id., at 386-387. The [Euclid] Court also laid out the general boundaries within which the zoning power may operate: Restrictions upon the free use of private land must find their justifications in 'some aspect of the police power, asserted for the public welfare': the legitimacy of any particular restriction must be judged with reference to all of the surrounding circumstances and conditions; and the legislative judgement is to control in cases in which the validity of a particular zoning regulation is 'fairly debatable.' Id., at 387, 388.
>
> "In the intervening years zoning has become an accepted necessity in our increasingly urbanized society, and the types of zoning restrictions have taken on forms far more complex and innovative than the ordinance involved in Euclid...."

427 U.S. at 73-74.

In order that the proper Constitutional balance might be maintained in the exercise of the city's interest in

planning and regulating the use of property for commercial purposes, the City of Henderson has undertaken steps to implement municipal code revisions which cover a variety of methods for regulating a wide-range of modern commercial uses, including adult businesses of the type authorized in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), and City of Renton v. Playtime Theatre, Inc., 475 U.S. 41 (1986).

Exercise of the municipal right to utilize innovative land-use regulation in the control of modern urban development has been recognized as implicating First Amendment concerns only incidentally and to a limited extent, in Young v. American Mini Theatres, Inc., supra [see concurring opinion of Mr. Justice Powell, at 475 U.S. 73-74]. However, legislation of this type is certain to meet with courtroom opposition by those whose businesses will be affected. In the City's view, these "courtroom" battles should be waged within

the State Court system, which accords a full and fair opportunity to present all Constitutional claims before the only tribunal which can interpret and construe the nuances of new municipal legislation (i.e. the state court system). See Watson v. Buck, 313 U.S. 389, 402 (1941); U.S. v. 37 Photographs, 402 U.S. 363 at 369-375 (1971); and U.S. V. 12-200 Ft. Reels of 8mm Film, 413 U.S. 123 at 130, fn. 7.

The City of Henderson, for a number of reasons expressed in its Petition 93-1969 in the case herein, urges that litigation regarding the interpretation of municipal legislation should not be initially conducted in Federal Court, but that an authoritative construction of all such new ordinances should be given by the Nevada State Court, except in those cases where the "exceptional circumstances" of Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) may make such impossible. Only where there are "extraordinary circumstances" is it appropriate for a

federal court to intrude in the state court adjudicatory process (as, for example, where a piece of municipal legislation is "flagrantly and patently violative of express constitutional prohibitions...," [see New Orleans Publ. Serv. v. New Orleans, 491, U.S. 350 (1989), at 366, referring to Younger v. Harris 401 U.S. at 53-54, quoting Watson v. Buck, 313 U.S. 387, 402 (1941)]. If this is to become an actuality, the final judgment in the City of Henderson et al. v. Nevada Entertainment Industries, Inc., et al. case must reflect that principle. See, in this regard, the opinion in Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1244 at 1248-1249 (CA 9, 1994):

> "If, however, the plaintiff can show that the state proceedings were instituted in bad faith, or if other extraordinary circumstances exist, then the federal court should not abstain. Younger, 401 U.S. 53-54, 91 S.Ct. at 755. For example, if a statute 'flagrantly and patently' violates 'express constitutional prohibitions in every clause, sentence and paragraph,' then federal intervention in state court proceedings is appropriate. Id. "

For the above reason, the City of Henderson requests that a mandamus order be directed to the Ninth Circuit requiring that Court to reinstate its November 2, 1994 ruling and to amend its interpretation to bring it into agreement with the concurring opinion expressed by Associate Justice Kennedy, then sitting as a Circuit Judge, in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079, at 1081 (CA 9, 1989), and the opinion of Circuit Judge Poole in Aiona, 17 F.3d 1244, at 1248-1250.

The Court of Appeals' unanimous Opinion, in 8 F.3d 1348 reviewed the facts of record before the Court of Appeal and held at page 1350 et seq. that the law expressed in this Court's opinions in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) and New Orleans Public Service, Inc. (NOPSI) v. City Council of New Orleans, 491 U.S. 350 (1989) set forth the principles which controlled that Court's

disposition of the City's cross-appeal; namely, that the Huffman abstention doctrines [Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)] required that the 42 U.S.C. Section 1983 complaint of Nevada Entertainment Industries, Inc. et al. must be dismissed under this Court's decision in Huffman v. Pursue, Ltd., supra.

Petitioner contends that the Court of Appeals subsequent Order of April 7, 1994, and its Memorandum of May 4, 1994 [see copies, attached hereto as Exhibit 4 and 5 to this Application], are arbitrary and capricious and ultra vires, in that the Court of Appeals, having ruled that Huffman abstention applied, and required that the case be dismissed on Huffman grounds, the Court must do so on those grounds: i.e. for lack of subject matter jurisdiction, which made any further proceedings impossible because the Court itself had no jurisdiction to act on the matter, in relation to the City of Henderson et al. acting for the State of Nevada who would

no longer be properly before the Court. Where this Court's mandate in Huffman, supra, is clear and is not being followed, a writ of mandamus is proper to require that such duty must be performed. See Connor v. Coleman, supra, 425 U.S. 675, at 678. See also Huffman v. Pursue, Ltd., supra, Brennan's dissent at footnote 1.

The following two substantial Federal Questions [set forth as Questions I and II in Petition No 93-1969 for Writ of Mandamus] have already been presented to the Respondent Court of Appeal in a Petition for Rehearing by the City of Henderson et al. as to that Court's May 4, 1994 Memorandum:

Question I:

Whether, the Huffman abstention doctrine is to be applied differently from other abstention doctrines; that is, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), must the United States District Court defer to the state court judicial system and dismiss for lack of subject matter jurisdiction the federal civil rights action of a State of Nevada citizen which seeks to enjoin enforcement of a quasi-judicial order of the Henderson City

Council, sitting as a hearing board for the State of Nevada; which revoked the federal plaintiffs' business license to do business in Henderson, Nevada, based on the City Council's finding of a fraudulent business license application; which order was pending in the state system and had been issued and served, but stayed for 10 days to permit an appeal to the Nevada State District Court; during which stay the Nevada citizen filed a civil rights lawsuit for an injunction under 42 U.S.C. Section 1983 in which the federal plaintiffs did not make any effort to plead and prove the requisite "extraordinary circumstances," nor did the United States District Court require that said issue be considered; the lack of which the City of Henderson pleaded as a defense on a motion to dismiss for lack of subject matter jurisdiction under the Eleventh Amendment and this Court's abstention ruling in Huffman, supra.

Question II:

Whether an Opinion expressing a unanimous decision of the Court of Appeals for the Ninth Circuit:

(1) that the principles of law expressed by Chief Justice Rehnquist in Huffman v. Pursue, Ltd. control and that the abstention doctrine applies to the facts set forth; and

(2) that the federal plaintiffs have not stated a cause of action which establishes subject matter jurisdiction for a federal injunction under 42 U.S.C. Section 1983; and

(3) that the cause of action must be dismissed for lack of subject matter jurisdiction; and

(4) in which the Court has made findings of fact and conclusions of law and entered a Judgment thereon, in a written Opinion which the Court has certified for publication as meeting the federal standards set forth in Rule 36 of the Federal Rules of Appellate Procedure and which has been published as 8 F.3d 1348 (CA 9, 1993);

may thereafter be withdrawn by the Court without providing a good and lawful reason?

(See copy of the City of Henderson Petition for Rehearing, attached hereto as Exhibit 6 to this Application). Real Parties in Interest Nevada Entertainment Industries, Inc. et al. have been granted an extension of time in which to file its Petition for Rehearing up to and including

June 21, 1994, and this Court's Order shortening time should require the Ninth Circuit Court of Appeal to act on or before that date.

Question 1 and Question 2 of the Petition for Writ of Mandamus, raise the important question as to the real meaning of the term "lack of subject matter jurisdiction" as that term has "meaning" in relation to the Huffman abstention doctrine. It presents a substantial federal constitutional question, not heretofore considered, which is "ripe" and should be resolved by this Court immediately, because:

(1) it is the center of a major on-going controversy between United States District Court and United States Circuit Court Judges in the Ninth Circuit, and elsewhere. See Huffman v. Pursue, Ltd., supra (Brennan dissenting, at footnote 1);

(2) is the central issue in both the City of Henderson's cross-appeal now before the Ninth Circuit Court of Appeals

on the City's Petition for a Rehearing and the City of Henderson's present Petition for Writ of Mandamus, culminating four years of continuing litigation on this issue; and

(3) the record below is simple and short, the issues before this Court on this Petition for Mandamus are squarely drawn by the action which was taken by the Ninth Circuit on April 7, 1994 and May 4, 1994, and are "ripe" for review by this Court pursuant to the Petition for Writ of Mandamus herein.

Questions 1 presents a substantial federal question as to a controversy before the federal judges at both the trial court and appellate court levels in relation to the real meaning of the Huffman doctrine. That conflict was drawn in focus by the concurring opinion of Associate Justice Kennedy then sitting as a Circuit Judge in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 at 1081 (CA 9, 1989) (Kennedy concurring

opinion). Petitioner City of Henderson et al. in its Petition for Writ of Mandamus on that Question contends that Justice Kennedy's interpretation is correct and is the underlying issue in its Petition for Writ of Mandamus, and is the issue which was raised by Justice Brennan in his dissent in 420 U.S. 612, at footnote 1; namely, that in those cases in which the Huffman abstention doctrine applies, and dismissal is mandated, the dismissal is and can be based on one ground only because of its historical basis -- lack of subject matter jurisdiction, meaning the federal court has determined that it has no jurisdiction over the action before it (because jurisdiction over the matter resides in the State Court under the Eleventh Amendment to the United States Supreme Constitution), and the "person" of the City of Henderson et al. acting for the State of Nevada, brought before the federal court, is no longer properly before the federal court. Further, it is

eminently clear that the "subject matter jurisdiction" issue has never been waived by the City of Henderson in its four years of litigation and should be answered by the Court of Appeals on the Petition for Writ of Mandamus herein. That issue is now squarely before the Court of Appeals on the City of Henderson et al.'s Petition for Rehearing.

The request for an ex parte order shortening time is also being brought for the purpose of calling this Court's attention to the ripeness of the issue and the Eleventh Amendment violation, so that this Court may consider whether it may wish to act to assume appellate jurisdiction of the substantial federal constitutional questions which are the subject of the Petition for Writ of Mandate, before the end of the 1993 October Term. Review by this Court of the matters raised by the Petition is urgently requested by the City of Henderson, et al., acting for the State of Nevada.

because the Federal Court Injunction [enjoining the Petitioners from the performance of lawful duties imposed by State law] -- a clear Eleventh Amendment violation -- has been in existence for four years and currently remains in force pending disposition of this case. Counsel for Petitioners has contacted Counsel of Record for Real Parties in Interest, who has indicated that he does not oppose Petitioners' request herein for an ex parte order shortening time.

This Court will end its 1993 October Term in about four weeks (on or about June 30, 1994) and, the Briefs in Opposition will not be due until 30 days after Respondents receipt of the Petition and this Motion and the Petition for Writ of Mandamus on file herein will not be distributed to the Court by the Clerk until receipt of such brief in opposition, which will in all likelihood occur after the Court has ended its Term. An order shortening time is necessary to permit

timely distribution for this Court to act during the 1993 Term of Court.

The Petition for a Writ of Mandamus of the United States Supreme Court has been filed concurrently with this Motion by Express Mail posted on June 3, 1994, and is now known as No. 93-1969. Service on the Respondent Court and on Counsel of Record for Real Parties in Interest was made by Express Mail posted on June 3, 1994.

Dated: June 11, 1994

Respectfully submitted,

James J. Clancy
Counsel of Record
For Petitioners

APPENDIX 3

ORDER OF U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 14, 1994, IN NO. 92-17054, 93-15052, DENYING THE CITY OF HENDERSON'S PETITION FOR REHEARING.

(Reference: Supplemental Brief at page 4.)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,	)
Plaintiffs/Appellants/ Cross-Appellees,	)
v.	)
CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,	)
Defendants/Appellees/ Cross-Appellants.	)

Nos. 92-17054
93-15052

D.C. No. CV-90-00264-LDG

FILED

JUN 14, 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: BROWNING and CANBY, Circuit Judges, KELLEHER,* Senior District Judge.

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* The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

The City of Henderson's petition for rehearing is denied.

APPENDIX 4

ORDER OF ASSOCIATE JUSTICE SANDRA D. O'CONNOR, DATED JUNE 15, 1994, DENYING THE CITY OF HENDERSON'S APPLICATION TO SHORTEN TIME TO FILE RESPONSES IN APPLICATION NO. A-1044.

(Reference: Supplemental Brief at page 4.)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543
AREA CODE 202
479-3011
WILLIAM K. SUTER
CLERK OF THE COURT

June 15, 1994

Mr. James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, CA 91352

Re: In Re City of Henderson, Nevada, et al.,
Application No. A-1044

Dear Mr. Clancy:

The application to shorten time to file responses and other relief in the above-entitled case has been presented to Justice O'Connor who on June 15, 1994, endorced thereon the following:

"Denied
Sandra D. O'Connor
6/15/94"

Sincerely,

WILLIAM K. SUTER, Clerk

By /S/

Francis J. Lorson
Chief Deputy Clerk

NOTE- FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notificcation list.

APPENDIX 5

5A. MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING IN COURT OF APPEALS FOR THE NINTH CIRCUIT, NO. 92-17054, 93-15052 UNDER F.R.A.P. RULE 40(a) (BASED UPON NEWLY DECIDED AUTHORITIES: KOKKONEN V. GUARDIAN LIFE INS. CO. OF AMERICA DECIDED BY THE U.S. SUPREME COURT ON MAY 16, 1994 (C.C.H. S.CT. BULLETIN B 1724-1732), FILED JUNE 17, 1994 (LESS APPENDIX A).

(Reference: Supplemental Brief at pages 4,5.)

5B. SECOND PETITION FOR REHEARING OF CITY OF HENDERSON IN THE COURT OF APPEALS FOR THE NINTH CIRCUIT, NO. 92-17054, 93-15052, LODGED JUNE 17, 1994.

(Reference: Supplemental Brief at pages 4,5.)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs/Appellants, and Cross-Appellees vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants/Appellees, and Cross-Appellants	) No. 92-17054) No. 93-15052)) [D.C. No.) CV-S-90-264-) LDG-LRL])))))))))))

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING UNDER FEDERAL RULES OF APPELLATE PROCEDURE, RULE 40(a) [BASED UPON NEWLY DECIDED AUTHORITIES]

Defendants/Appellees/Cross-Appellants City of Henderson, a Nevada Municipal corporation, and James Goff, Chief of Police of the City of Henderson (hereinafter "City of Henderson") hereby respectfully move this Honorable Court for an order granting leave to file a Second Petition for Rehearing pursuant to Federal

Rules of Appellate Procedure, Rule 40(a), based upon a new authority which was published two days before the filing of the Original Petition [Kokkonen v. Guardian Life Ins. Co. of America, decided by the United States Supreme Court on May 16, 1994, CCH S.Ct. Bull. p. B1724-1732].

Said motion is based upon the Declaration of James J. Clancy, and the Points and Authorities hereinafter set forth.

Respectfully submitted,

James J. Clancy
For Defendants/
Appellees, and
Cross-Appellants

DECLARATION OF JAMES J. CLANCY

I, JAMES J. CLANCY, declare as follows:

1. I am an attorney at law, duly admitted to practice before the United States Court of Appeals for the Ninth

Circuit, and the United States Supreme Court.

2. On November 2, 1993, this court reversed the United States District Court's Judgment and filed an Opinion in which it declared that the United States District Court should have abstained under principles of law expressed in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and certified the same for publication under Circuit Rule 36-2, which was reported in the advance sheets as Nevada Entertainment Industries, Inc. et al. v. City of Henderson et al., 8 F.3d 1348 (CA9, November 2, 1993).

3. On April 7, 1994, this Court filed an order in which it granted the petition for rehearing of Nevada Entertainment Industries, Inc. and withdrew its Opinion filed on November 2, 1993. On May 4, 1994, this Court filed a Memorandum decision which affirmed the United States District Court's Judgment and dismissed, as moot, the City of

Henderson's Cross-Appeal which argued that the action should have been dismissed under Huffman, supra.

4. On May 18, 1994, the City of Henderson filed a Petition for Rehearing, and on May 17, 1994 this Court filed an order enlarging the time for Nevada Entertainment Industries, Inc. et al. to file a Petition for Rehearing to June 21, 1994, which, as of this date, has not yet been filed.

5. On June 6, 1994, the City of Henderson filed a Petition for Writ of Mandamus (or Certiorari Under Rule 11) to the United States Court of Appeals for the Ninth Circuit, Docket No. 93-1969 in the United States Supreme Court, requesting, among other things, an Order that the May 4, 1994 Judgment of this Court be reversed for lack of "subject matter jurisdiction." Said grounds (subject matter jurisdiction) were not specifically named in relation to the May 4, 1994 judgment, in the May 18th Petition for Rehearing.

6. On June 14, 1992, the City of Henderson filed an amended Application in No. 93-1969 in the United States Supreme Court requesting that the Court shorten time and act upon the City of Henderson's Petition for Writ of Mandamus (based upon "lack of subject matter jurisdiction") before the end of the October Term, 1993.

7. On May 16, 1994, two days prior to the filing of moving parties' First Petition for Rehearing, the United States Supreme court filed its opinion in Kokkonen v. Guardian Life Ins. Co. of America, supra. See copy attached to this Motion as Exhibit A. In Kokkonen, supra, a unanimous United States Supreme Court issued an unanimous opinion of the Court on the effect of lack of "subject matter jurisdiction," holding that subject matter jurisdiction is not to be presumed, and a federal district court must dismiss a complaint unless there is some independent basis for federal jurisdiction, and the burden to establish that there is a basis

for federal jurisdiction is on the federal plaintiff, stating at B1727:

> "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see Willy v. Coastal Corp., 503 U.S. ___ (1992) (slip op., at 4-5); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree, American Fire & Casualty Co. V. Finn, 341 U.S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, Turner v. President of Bank of North-America, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182-183 (1936)."

8. In this Second Petition for Rehearing, the City of Henderson respectfully invites this Court's attention to the rationale set forth in the Kokkonen case as a further reason for granting a rehearing, for all of the reasons expressed in the arguments made by the City in its Petition for Writ of Mandamus in Docket No. 93-1969, referred to in paragraph 5, above, a copy of which was served upon the members of this Court on or about June 3, 1994.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 15, 1994, at Sun Valley, California.

James J. Clancy
Declarant

MEMORANDUM OF POINTS AND AUTHORITIES

I

Federal Rules of Appellate Procedure, Rule 40(a), provides in relevant part, as follows:

> "(a) Time for filing; content; answer; action by court if granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present...." (Our Emphasis.)

II

As a result of this Court's November 2, 1993 Opinion and Judgment, "subject

matter jurisdiction" now has "two heads" in this appeal.

The United States Supreme Court's rationale and holdings in the Kokkonen case is relevant on two issues involving the legal concept "subject matter jurisdiction" as it applies in this case:

> (1) whether, in view of the City of Henderson's claim that Huffman v. Pursue, Ltd. was controlling, the federal district court had "subject matter jurisdiction" at the outset;
>
> (2) whether, in view of this Court's finding that Huffman v. Pursue, Ltd., was controlling precedent, this Court exhausted its subject matter jurisdiction when it published its November 2, 1993 Opinion and filed its November 2, 1993 judgment.

Absent some independent basis for federal jurisdiction, a federal court lacks the power [i.e. lacks "subject matter jurisdiction"] to either enforce or enjoin

a state judgment. In this case a judgment of license revocation was issued by a state quasi-judicial administrative body, which judgment was subject to judicial review within the state court system. Since "extraordinary circumstances" were absent, the federal court lacked "subject matter jurisdiction" over this state decision, and could not lawfully conduct a review of the state proceedings, nor enjoin enforcement of the state judgment. The federal court should have abstained in this case under the Huffman doctrine.

Dated: June 15, 1994

Respectfully submitted,

James J. Clancy
For Defendants/
Appellees and
Cross-Appellants

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs/Appellants, and Cross-Appellees vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants/Appellees, and Cross-Appellants	) No. 92-17054) No. 93-15052)) [D.C. NO.) CV-S-90-264-) LDG-LRL]

APPEAL FROM THE U.S. DISTRICT COURT

FOR THE DISTRICT OF NEVADA,

HON. LLOYD D. GEORGE, DISTRICT JUDGE

SECOND PETITION FOR REHEARING

JAMES J. CLANCY (State Bar. #26946)
CAROL A. CLANCY (State Bar #065453)
9055 La Tuna Canyon Road
Sun Valley, California
(818) 352-2069
Attorneys for Defendants/Appellees
and Cross-Appellants

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs/Appellants, and Cross-Appellees vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants/Appellees, and Cross-Appellants	) No. 92-17054) No. 93-15052)) [D.C. NO.) CV-S-90-264-) LDG-LRL])))))))))))

SECOND PETITION FOR REHEARING

TO THE CLERK OF THE COURT:

The City of Henderson, et al. (hereinafter "City of Henderson") petitions the Court to vacate its order of April 7, 1994 and Memorandum of May 4, 1994, in order to reconsider the City's Cross-appeal and whether the issues presented therein are moot, in light of the recent unanimous decision of the

United States Supreme Court in Kokkonen v. Guardian Life Insurance Company of America, CCH S.Ct. Bull. p. B1724-1732, decided by the High Court on May 16, 1994, in which a unanimous United States Supreme Court issued an opinion of the Court on the effect of lack of "subject matter jurisdiction," holding that subject matter jurisdiction is not to be presumed, and a federal district court must dismiss a complaint unless there is some independent basis for federal jurisdiction, and the burden to establish that there is a basis for federal jurisdiction is on the federal plaintiff, stating at B1727:

> "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see Willy v. Coastal Corp., 503 U.S. ___ (1992) (slip op., at 4-5); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree, American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, Turner v. President of Bank of North-America, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction,

McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182-183 (1936)."

In a Petition for Rehearing, dated May 17, 1994, and filed on May 18, 1994, the City of Henderson (at page 1 thereof) asked for a rehearing:

> "in light of certain material facts and law overlooked by the Court, and an apparent conflict with another Decision of this Court; and to reexamine its order that said memorandum 'is not appropriate for publication and may not be cited.'"

By order filed November 17, 1994, this Court granted an extention of time for Nevada Entertainment Industries, Inc., et al. to file their Petition for Rehearing to June 21, 1994.

The City of Henderson's Second Petition for Rehearing is predicated upon a different ground from that stated in the first Petition for Rehearing, i.e. the impact of the United States Supreme Court's ruling on May 16, 1994, in Kokkonen v. Guardian Life Ins. Co. of America, supra, in light of the City's additional claim that this Court's action

in withdrawing the November 2, 1993 Opinion and Judgment was arbitrary, capricious and ultra vires, in that the Court, having ruled in the November 2, 1993 Opinion that Huffman v. Pursue, Ltd. applied, had, in publishing that Opinion exhausted its "subject matter jurisdiction" and its subsequent action on April 7, 1994 and May 4, 1994 were ultra vires.

In four years of litigation, the City of Henderson has claimed that, upon the record below and absent the pleading and proof of "extraordinary circumstances," Nevada Entertainment Industries, Inc. et al failed to state a federal cause of action for a civil injunction against the City under 42 U.S.C. Section 1983, and therefore, the United States District Court lacked "subject matter jurisdiction" under the United States Supreme Court's decision in Huffman v. Pursue, Ltd., 420 U.S. 592, and the Tenth and Eleventh Amendments to the federal Constitution.

In its Petition for Writ of Mandamus, filed on June 6, 1994, as In Re City of Henderson et al. v. Nevada Entertainment Industries, Inc. et al., in No. 93-1969, the City contends at pages 4-5: (1) that the United States District Court and the United States Court of Appeals (having found that the City had acted lawfully, and not ultra vires) [see Ex parte Young, 209 U.S. 123 (1908)], had conclusively established that that Court lacked "subject matter jurisdiction" and it must dismiss under Huffman, supra, and additionally at pages 48-49, (2) this Court having certified its Opinion that Huffman controlled and entered a Judgment and Opinion to that effect, had exhausted its jurisdiction and that its April 7, 1994 and May 4, 1994 actions were ultra vires (based upon lack of "subject matter jurisdiction"). The reasons for this Court's granting a rehearing on these ground are as follows (see, also, Amended Application in Case No. 93-1969, copy of

which has been filed with this Court, at pages 3-12):

REASONS FOR GRANTING A REHEARING

Because favorable weather and an equally favorable economy have contributed to the growth of the geographical area of Henderson, Nevada (located in close proximity to Las Vegas) as an attractive place for family living and new businesses, an influx of new residents is anticipated. The City of Henderson must respond to the challenges presented by this increased expansion and urbanization.

Over half a century ago the United States Supreme Court broadly sustained the power of local municipalities to utilize land-use regulation in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens. See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the seminal case dealing with

the regulation of adult uses through municipal zoning, Mr. Justice Powell, in his concurring opinion, referring to Euclid, remarked

> "The Court there noted the very practical consideration underlying the necessity for the power: '[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.' Id., at 386-387. The [Euclid] Court also laid out the general boundaries within which the zoning power may operate: Restrictions upon the free use of private land must find their justifications in 'some aspect of the police power, asserted for the public welfare': the legitimacy of any particular restriction must be judged with reference to all of the surrounding circumstances and conditions; and the legislative judgement is to control in cases in which the validity of a particular zoning regulation is 'fairly debatable.' Id., at 387, 388.
>
> "In the intervening years zoning has become an accepted necessity in our increasingly urbanized society, and the types of zoning restrictions have taken on forms far more complex and innovative than the ordinance involved in Euclid . . ." 427 U.S. at 73-74.

In order that the proper Constitutional balance might be maintained

in the exercise of the city's interest in planning and regulating the use of property for commercial purposes, the City of Henderson has undertaken steps to implement municipal code revisions which cover a variety of methods for regulating a wide-range of modern commercial uses, including adult businesses of the type authorized in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), and City of Renton v. Playtime Theatre, Inc., 475 U.S. 41 (1986).

Exercise of the municipal right to utilize innovative land-use regulation in the control of modern urban development has been recognized as implicating First Amendment concerns only incidentally and to a limited extent, in Young v. American Mini Theatres, Inc., supra [see concurring opinion of Mr. Justice Powell, at 475 U.S. 73-74]. However, legislation of this type is certain to meet with courtroom opposition by those whose businesses will be affected. In the City's view, these

"courtroom" battles should be waged within the State Court system, which accords a full and fair opportunity to present all Constitutional claims before the only tribunal which can interpret and construe the nuances of new municipal legislation (i.e. the state court system). See Watson v. Buck, 313 U.S. 389, 402 (1941); U.S. v. 37 Photographs, 402 U.S. 363 at 369-375 (1971); and U.S. v. 12-200 Ft. Reels of 8mm Film, 413 U.S. 123 at 130, fn. 7. It is clear in an appeal from a quasi-judicial administrative hearing, the Nevada judicial system is empowered to examine all legal issues (including federal constitutional claims). See Boulder City, Nevada, et al. v. Cinnamon Hills Associates et al., No. 23951, 110 Nev., Advance Opinion 27 (March 30, 1994), slip opinion at p. 7 [in appeal arising out of dispute over denial by administrative body of building permit, Nevada courts "may examine constitutional issues on appeal that substantially impact

the rights of the litigants," citing McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983), and "a litigant may state a viable [42 U.S.C.] Section 1983 claim if denied a building permit in violation of protected constitutional rights," citing Bateson v. Geisse, 857 F.2d 1300, 1303 (9th Cir. 1988); Scott v. Greenville County, 716 F.2d 1409, 1421 (4th Cir. 1983); and "absent any constitutional infringement, a section 1983 claim fails"].

The City of Henderson, for a number of reasons expressed in its Petition in No. 93-1969, urges that litigation regarding the interpretation of municipal legislation should not be initially conducted in Federal Court, but that an authoritative construction of all such new ordinances should be given by the Nevada State Court, except in those cases where the "exceptional circumstances" of Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) may make such impossible. Only where there

are "extraordinary circumstances" is it appropriate for a federal court to intrude in the state court adjudicatory process (as, for example, where a piece of municipal legislation is "flagrantly and patently violative of express constitutional prohibitions...," [see New Orleans Publ. Serv. v. New Orleans, 491 U.S. 350 (1989), at 366, referring to Younger v. Harris, 401 U.S. at 53-54, quoting Watson v. Buck, 313 U.S. 387, 402 (1941)]. If this is to become an actuality, the final judgment in the City of Henderson et al. v. Nevada Entertainment Industries, Inc., et al. case must reflect that principle. See, in this regard, the opinion in Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1244 at 1248-1249 (CA 9, 1994):

> "If, however, the plaintiff can show that the state proceedings were instituted in bad faith, or if other extraordinary circumstances exist, then the federal court should not abstain. Younger, 401 U.S. 53-54, 91 S.Ct. at 755. For example, if a statute 'flagrantly and patently' violates 'express constitutional

> prohibitions in every clause, sentence and paragraph,' then federal intervention in state court proceedings is appropriate. Id. "

For the above reason, the City of Henderson has requested that a mandamus order be directed to the Ninth Circuit requiring this Court to reinstate its November 2, 1994 ruling and to amend its interpretation to bring it into agreement with the concurring opinion expressed by Associate Justice Kennedy, then sitting as a Circuit Judge, in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079, at 1081 (CA 9, 1989), and the opinion of Circuit Judge Poole in Aiona, 17 F.3d 1244, at 1248-1250.

This Court's unanimous Opinion, in 8 F.3d 1348 reviewed the facts of record before the Court of Appeals and held at page 1350 et seq. that the law expressed in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) and New Orleans Public Service, Inc. (NOPSI) v. City Council of New

Orleans, 491 U.S. 350 (1989) set forth the principles which controlled this Court's disposition of the City's cross-appeal; namely, that the Huffman abstention doctrines [Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)] required that the 42 U.S.C. Section 1983 complaint of Nevada Entertainment Industries, Inc. et al. must be dismissed under the United States Supreme Court's decision in Huffman v. Pursue, Ltd., supra.

Petitioner contends that this Court's subsequent Order of April 7, 1994, and its Memorandum of May 4, 1994, are arbitrary and capricious and ultra vires, in that, having ruled that Huffman abstention applied, and required that the case be dismissed on Huffman grounds, this Court must do so on those grounds: i.e. for lack of subject matter jurisdiction, which made any further proceedings impossible because the Court itself had no jurisdiction to act on the matter, in relation to the City of Henderson et al. acting for the State

of Nevada who would no longer be properly before the Court. Where the High Court's mandate in Huffman, supra, is clear and has not been followed by this Court, a writ of mandamus is proper to require that such duty must be performed. See Connor v. Coleman, supra, 425 U.S. 675, at 678. Kokkonen v. Guardian Life Ins. Co. of America, supra. See also Huffman v. Pursue, Ltd., supra, Brennan's dissent at footnote 1. It is interesting to note that the Counsel in Kokkonen has informed the City of Henderson's counsel that seven states filed an amicus brief in support of their position on subject matter jurisdiction.

The following two substantial Federal Questions have already been presented to the United States Supreme Court as Questions I and II in Petition No 93-1969 for Writ of Mandamus:

Question I:

Whether, the Huffman abstention doctrine is to be applied differently from other abstention doctrines; that is, under Huffman v. Pursue, Ltd., 420 U.S. 592

(1975), must the United States District Court defer to the state court judicial system and dismiss for lack of subject matter jurisdiction the federal civil rights action of a State of Nevada citizen which seeks to enjoin enforcement of a quasi-judicial order of the Henderson City Council, sitting as a hearing board for the State of Nevada; which revoked the federal plaintiffs' business license to do business in Henderson, Nevada, based on the City Council's finding of a fraudulent business license application; which order was pending in the state system and had been issued and served, but stayed for 10 days to permit an appeal to the Nevada State District Court; during which stay the Nevada citizen filed a civil rights lawsuit for an injunction under 42 U.S.C. Section 1983 in which the federal plaintiffs did not make any effort to plead and prove the requisite "extraordinary circumstances," nor did the U.S. District Court require that said issue be considered; the lack of which the City of Henderson pleaded as a defense on a motion to dismiss for lack of subject matter jurisdiction under the 11th Amendment and this Court's abstention ruling in Huffman, supra.

Question II:

Whether an Opinion expressing a unanimous decision of the Court of Appeals for the Ninth Circuit:

(1) that the principles of law expressed by Chief Justice Rehnquist in Huffman v. Pursue, Ltd. control and that the abstention doctrine applies to the facts set forth; and

(2) that the federal plaintiffs have not stated a cause of action which establishes subject matter jurisdiction for a federal injunction under 42 U.S.C. Section 1983; and

(3) that the cause of action must be dismissed for lack of subject matter jurisdiction; and

(4) in which the Court has made

findings of fact and conclusions of law and entered a Judgment thereon, in a written Opinion which the Court has certified for publication as meeting the federal standards set forth in Rule 36 of the Federal Rules of Appellate Procedure and which has been published as 8 F.3d 1348 (CA 9, 1993); may thereafter be withdrawn by the Court without providing a good and lawful reason?

This Court has granted Nevada Entertainment Industries, Inc. et al. an extension of time in which to file its Petition for Rehearing up to and including June 21, 1994. In a separate Application to the U.S. Supreme Court with respect to Docket No. 93-1969, the City of Henderson has requested an Order shortening time which would require this Court to act on or before that date (June 21, 1994).

Question 1 and Question 2 of the Petition for Writ of Mandamus, raise the important question as to the <u>real meaning</u> of the term "lack of subject matter jurisdiction" as that term has "meaning" in relation to the <u>Huffman</u> abstention doctrine. It presents a substantial federal constitutional question, not

heretofore considered, which is "ripe" and should be resolved immediately, because:

(1) it is the center of a major on-going controversy between United States District Court and United States Circuit Court Judges in the Ninth Circuit, and elsewhere. See Huffman v. Pursue, Ltd., supra (Brennan dissenting, at footnote 1);

(2) is the central issue in both the City of Henderson's cross-appeal now before this Court on the City's Petition for a Rehearing and the City of Henderson's present Petition for Writ of Mandamus, culminating four years of continuing litigation on this issue; and

(3) the record below is simple and short, the issues before this Court are squarely drawn by the action which was taken by this Court on April 7, 1994 and May 4, 1994, and are "ripe" for review by the United States Supreme Court pursuant to the Petition for Writ of Mandamus in No. 93-1969.

Questions 1 presents a substantial

federal question as to a controversy before the federal judges at both the trial court and appellate court levels in relation to the real meaning of the Huffman doctrine. That conflict was drawn in focus by the concurring opinion of Associate Justice Kennedy then sitting as a Circuit Judge in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 at 1081 (CA 9, 1989) (Kennedy concurring opinion). Petitioner City of Henderson et al. in its Petition for Writ of Mandamus on that Question contends that Justice Kennedy's interpretation is correct and is the underlying issue in its Petition for Writ of Mandamus, and is the issue which was raised by Justice Brennan in his dissent in 420 U.S. 612, at footnote 1; namely, that in those cases in which the Huffman abstention doctrine applies, and dismissal is mandated, the dismissal is and can be based on one ground only because of its historical basis -- lack of subject matter jurisdiction, meaning the

federal court has determined that it has no jurisdiction over the action before it (because jurisdiction over the matter resides in the State Court under the Eleventh Amendment to the United States Supreme Constitution), and the "person" of the City of Henderson et al. acting for the State of Nevada, brought before the federal court, is no longer properly before the federal court. Further, it is clear that the "subject matter jurisdiction" issue has never been waived by the City of Henderson in its four years of litigation and should be answered by this Court on the Petition for Rehearing herein. That issue is now squarely before this Court on the City of Henderson et al.'s Second Petition for Rehearing.

Review by this Court of the matters raised by this Second Petition for Rehearing is urgently requested by the City of Henderson, et al., acting for the State of Nevada, because the Federal Court Injunction [enjoining the Petitioners from

the performance of lawful duties imposed by State law] -- a clear Eleventh Amendment violation -- has been in existence for four years and currently remains in force pending disposition of this case.

Counsel for Petitioners has contacted Counsel of Record for Real Parties in Interest, who has indicated that he does not oppose Petitioners' request for an ex parte order shortening time in the United States Supreme Court, and has stated he will file an express waiver of the right to file a response in the United States Supreme Court under Rule 20.5, so as to permit the Petition for Writ of Mandamus to be distributed to the members of the United States Supreme Court for their consideration at this time. Petitioner City of Henderson respectfully submits that a similar waiver by this Court pursuant to Rule 20.5 would greatly facilitate an early resolution of the central issues in the appeal and

cross-appeal herein.

Dated: June 14, 1994

Respectfully submitted,

James J. Clancy
For Defendants/
Appellees, and
Cross-Appellants

APPENDIX 6

MOTION OF CITY OF HENDERSON FOR ORDER STAYING MANDATE IN U.S. COURT OF APPEAL FOR THE NINTH CIRCUIT IN CASE NO. 92-17054, 93-15052.

(Reference: Supplemental Brief at page 5.)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs/Appellants, and Cross-Appellees vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants/Appellees, and Cross-Appellants	) No. 92-17054) No. 93-15052)) [D.C. NO.) CV-S-90-264-) LDG-LRL]

MOTION FOR ORDER STAYING MANDATE

Defendants/Appellees/Cross-Appellants City of Henderson, a Nevada Municipal corporation, and James Goff, Chief of Police of the City of Henderson (hereinafter "City of Henderson") hereby respectfully move this Honorable Court for an order pursuant to Federal Rules of Appellate Procedure, Rule 41(b), staying its mandate.

Said notice is based upon the

Declaration of James J. Clancy, and the Points and Authorities hereinafter set forth.

Respectfully submitted,

_____

James J. Clancy
For Defendants/
Appellees, and
Cross-Appellants

DECLARATION OF JAMES J. CLANCY

I, JAMES J. CLANCY, declare as follows:

1. I am an attorney at law, duly admitted to practice before the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

2. On November 2, 1993, this court reversed the United States District Court's Judgment and filed an Opinion in which it declared that the United States District Court should have abstained under principles of law expressed in Huffman v.

Pursue, Ltd., 420 U.S. 592 (1975), and certified the same for publication under Circuit Rule 36-2, which was reported in the advance sheets as Nevada Entertainment Industries, Inc. et al. v. City of Henderson et al., 8 F.3d 1348 (CA9, November 2, 1993).

3. On April 7, 1994, this Court filed an order in which it granted the petition for rehearing of Nevada Entertainment Industries, Inc. and withdrew its Opinion filed on November 2, 1993. On May 4, 1994, this Court filed a Memorandum decision which affirmed the United States District Court's Judgment and dismissed, as moot, the City of Henderson's Cross-Appeal which argued that the action should have been dismissed under Huffman, supra.

4. On May 18, 1994, the City of Henderson filed a Petition for Rehearing, and on May 17, 1994 this Court filed an order extending the time for Nevada Entertainment Industries, Inc. et al. to

file a Petition for Rehearing to June 21, 1994.

5. On June 6, 1994, the City of Henderson filed a Petition for Writ of Mandamus (or Certiorari Under Rule 11) to the United States Court of Appeals for the Ninth Circuit, Docket No. 93-1969 in the United States Supreme Court, requesting, among other things, an Order that the May 4, 1994 Judgment of this Court be reversed as arbitrary, capricious and ultra vires (for lack of "subject matter jurisdiction") and that this Court's November 2, 1993 Opinion be reinstated and modified.

6. On June 14, 1992, the City of Henderson filed an amended Application in No. 93-1969 in the United States Supreme Court requesting that the Court shorten time and act upon the City of Henderson's Petition for Writ of Mandamus (based upon "lack of subject matter jurisdiction") before the end of the October Term, 1993.

7. Neither the Petition for

Rehearing nor the Petition for a Writ of Mandamus (or Certiorari Under Rule 11) in No. 93-1969, nor the Application in No. 93-1969 is frivolous, nor were such filings made for purposes of delay. See copies of such papers on file in this Court. See, also, Kokkonen v. Guardian Life Insurance Company of America, CCH S.Ct. Bull. p. B1724-1732, decided by the High Court on May 16, 1994, in which a unanimous United States Supreme Court issued an opinion of the Court on the effect of lack of "subject matter jurisdiction," holding that subject matter jurisdiction is not to be presumed, and a federal district court must dismiss a complaint unless there is some independent basis for federal jurisdiction, and the burden to establish that there is a basis for federal jurisdiction is on the federal plaintiff, stating at B1727:

> "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see Willy v. Coastal Corp., 503 U.S. ___ (1992)

(slip op., at 4-5); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree, American Fire & Casualty Co. V. Finn, 341 U.S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, Turner v. President of Bank of North-America, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182-183 (1936)."

8. Declarant requests that an order staying the mandate be granted to allow the United States Supreme Court to act upon the Petition for Writ of Mandate.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 14, 1994, at Sun Valley, California.

James J. Clancy
Declarant

MEMORANDUM OF POINTS AND AUTHRORITIES

I

Federal Rules of Appellate Procedure, Rule 41, provides in relevant part as follows:

> "(a) Date of issuance....The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.
>
> "(b) Stay of mandate pending application for certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court...."

II

Circuit Advisory Committee Note to Rule 41-1 provides as follows:

> "The mandate will not be stayed automatically upon the filing of an

application to the Supreme Court for Writ of Certiorari. However, a stay may be granted upon motion....The motion will not be routinely granted; it will be denied if the Court determines that the application for certiorari would be frivolous or is made merely for delay."

Dated: June 14, 1994

Respectfully submitted,

James J. Clancy
For Defendants/
Appellees and
Cross-Appellants

APPENDIX 7

MOTION OF CITY OF HENDERSON IN THE U.S. SUPREME COURT FOR ORDER TO SHOW CAUSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMOUS (LESS EXHIBITS 1-6).

(Reference: Supplemental Brief at page 6.)

No. 93-1969

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

IN RE CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,
REAL PARTIES IN INTEREST

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE HON. JAMES R. BROWNING, AND WILLIAM C. CANBY, JR., CIRCUIT JUDGES, AND ROBERT J. KELLEHER, SENIOR DISTRICT JUDGE SITTING BY DESIGNATION

MOTION FOR ORDER TO SHOW CAUSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

Petitioners City of Henderson, a Nevada Municipal Corporation, and James Goff, Chief of Police of the City of Henderson, Nevada (hereinafter "City of Henderson"), through their counsel of

record, respectfully move the Court for an order requiring the respondent Ninth Circuit Court of Appeals to reinstate its November 2, 1993 Opinion which is reported at 8 F.3d 1348 (CA 9, November 2, 1993) [see copy attached hereto as Exhibit 2 to this Motion] or show cause, on a date certain why it should not be required to do so, by serving and filing a response with the Clerk of this Court on that date certain, to the substantial federal questions presented in the Petition for Writ of Mandamus In re City of Henderson et al. v. Nevada Entertainment et al., No. 93-1969 filed on June 6, 1994 concurrently with this motion. See Peggy J. Connor v. J.P. Coleman, U.S. Circuit Judge et al., 425 U.S. 675 (1976) [see copy attached hereto as Exhibit 3 to this Motion]. See United States Supreme Court Rules, Rule 21.

INTRODUCTION

On June 6, 1994, a Petition for Writ of Mandamus (or Certiorari Under Rule 11)

to the United States Court of Appeals for the Ninth Circuit was filed in In re City of Henderson, a Nevada Municipal Corporation, James Goff, Chief of Police of the City of Henderson, v. Nevada Entertainment Industries, Inc., a Nevada Corporation and Daniel Bishop, No. 93-1969.

On June 15, 1994, an Application for an ex parte order shortening time, addressed to Associate Justice Sandra Day O'Connor, was presented to Justice O'Connor who, on June 15, 1994, endorsed thereon the following: "Denied. Sandra D. O'Connor. 6/15/94."

On June 14, 1994, the Court of Appeals for the Ninth Circuit (Browning and Canby, Circuit Judges, Kelleher, Senior District Judge) denied the Petition for Rehearing of the City of Henderson, filed on May 18, 1994 (see copy of Petition at Exhibit 6 to this Motion).

On June 14, 1994, the City of Henderson filed in the Ninth Circuit Court

of Appeals a Motion for Order Staying Mandate to allow the United States Supreme Court to act upon its Petition for Writ of Mandate.

On or about June 15, 1994, the City of Henderson filed in the Ninth Circuit Court of Appeals: (1) a Motion for Leave to File Second Petition for Rehearing under Federal Rules of Appellate Procedure 40(a), based upon newly decided authorities [Kokkonen v. General Life Ins. Co. of America, decided by the United States Supreme Court on May 16, 1994, CCH S.Ct. Bull p. 1724-1732] (see copy attached as Exhibit 1A to this Motion), and (2) a Second Petition for Rehearing (see copy attached as Exhibit 1B to this Motion.

On or about June 17, 1994, which date was four days in advance of the time extension granted (April 21, 1994), Nevada Entertainment Industries Inc., et al (hereinafter "Nevada Entertainment) filed its Petition for Rehearing in the United

States Court of Appeals for the Ninth Circuit).

REASONS FOR THE WRIT OF MANDATE

Because favorable weather and an equally favorable economy have contributed to the growth of the geographical area of Henderson, Nevada (located in close proximity to Las Vegas) as an attractive place for family living and new businesses, an influx of new residents is anticipated. The City of Henderson must respond to the challenges presented by this increased expansion and urbanization.

Over half a century ago this Court broadly sustained the power of local municipalities to utilize land-use regulation in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens. See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In Young v. American Mini Theatres, Inc., 427 U. S. 50 (1976), the seminal case dealing with the regulation of adult uses through

municipal zoning, Mr. Justice Powell, in his concurring opinion, referring to Euclid, remarked

> "The Court there noted the very practical consideration underlying the necessity for the power: '[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." Id., at 386-387. The [Euclid] Court also laid out the general boundaries within which the zoning power may operate: Restrictions upon the free use of private land must find their justifications in 'some aspect of the policepower, asserted for the public welfare': the legitimacy ofany particular restriction must be judged with reference to all of the surrounding circumstances and conditions; and the legislative judgement is to control in cases in which the validity of a particular zoning regulation is 'fairly debatable.' Id., at 387, 388.
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> "In the intervening years zoning has become an accepted necessity in our increasingly urbanized society, and the types of zoning restrictions have taken on forms far more complex and innovative than the ordinance involved in Euclid...." 427 U.S. at 73-74.

In order that the proper Constitutional balance might be maintained in the exercise of the city's interest in

planning and regulating the use of property for commercial purposes, the City of Henderson has undertaken steps to implement municipal code revisions which cover a variety of methods for regulating a wide-range of modern commercial uses, including adult businesses of the type authorized in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), and City of Renton v. Playtime Theatre, Inc., 475 U.S. 41 (1986).

Exercise of the municipal right to utilize innovative land-use regulation in the control of modern urban development has been recognized as implicating First Amendment concerns only incidentally and to a limited extent, in Young v. American Mini Theatres, Inc., supra [see concurring opinion of Mr. Justice Powell, at 475 U.S. 73-74]. However, legislation of this type is certain to meet with courtroom opposition by those whose businesses will be affected. In the City's view, these "courtroom" battles should be waged within

the State Court system, which accords a full and fair opportunity to present all Constitutional claims before the only tribunal which can interpret and construe the nuances of new municipal legislation (i.e. the state court system). See Watson v. Buck, 313 U.S. 389, 402 (1941); U.S. v. 37 Photographs, 402 U.S. 363 at 369-375 (1971); and U.S. V. 12-200 Ft. Reels of 8mm Film, 413 U.S. 123 at 130, fn. 7.

The City of Henderson, for a number of reasons expressed in its Petition 93-1969 in the case herein, urges that litigation regarding the interpretation of municipal legislation should not be initially conducted in Federal Court, but that an authoritative construction of all such new ordinances should be given by the Nevada State Court, except in those cases where the "exceptional circumstances" of Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) may make such impossible. Only where there are "extraordinary circumstances" is it appropriate for a

federal court to intrude in the state court adjudicatory process (as, for example, where a piece of municipal legislation is "flagrantly and patently violative of express constitutional prohibitions...," [see New Orleans Publ. Serv. v. New Orleans, 491, U.S. 350 (1989), at 366, referring to Younger v. Harris 401 U.S. at 53-54, quoting Watson v. Buck, 313 U.S. 387, 402 (1941)]. If this is to become an actuality, the final judgment in the City of Henderson et al. v. Nevada Entertainment Industries, Inc., et al. case must reflect that principle. See, in this regard, the opinion in Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1244 at 1248-1249 (CA 9, 1994):

> "If, however, the plaintiff can show that the state proceedings were instituted in bad faith, or if other extraordinary circumstances exist, then the federal court should not abstain. Younger, 401 U.S. 53-54, 91 S.Ct. at 755. For example, if a statute 'flagrantly and patently' violates 'express constitutional prohibitions in every clause, sentence and paragraph,' then federal intervention in state court proceedings is appropriate. Id. "

For the above reason, the City of Henderson requests that a mandamus order be directed to the Ninth Circuit requiring that Court to reinstate its November 2, 1994 ruling and to amend its interpretation to bring it into agreement with the concurring opinion expressed by Associate Justice Kennedy, then sitting as a Circuit Judge, in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079, at 1081 (CA 9, 1989), and the opinion of Circuit Judge Poole in Aiona, 17 F.3d 1244, at 1248-1250.

The Court of Appeals' unanimous Opinion, in 8 F.3d 1348 reviewed the facts of record before the Court of Appeal and held at page 1350 et seq. that the law expressed in this Court's opinions in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) and New Orleans Public Service, Inc. (NOPSI) v. City Council of New Orleans, 491 U.S. 350 (1989) set forth the principles which controlled that Court's

disposition of the City's cross-appeal; namely, that the Huffman abstention doctrines [Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)] required that the 42 U.S.C. Section 1983 complaint of Nevada Entertainment Industries, Inc. et al. must be dismissed under this Court's decision in Huffman v. Pursue, Ltd., supra.

Petitioner contends that the Court of Appeals subsequent Order of April 7, 1994, and its Memorandum of May 4, 1994 [see copies, attached hereto as Exhibit 4 and 5 to this Application], are arbitrary and capricious and ultra vires, in that the Court of Appeals, having ruled that Huffman abstention applied, and required that the case be dismissed on Huffman grounds, the Court must do so on those grounds: i.e. for lack of subject matter jurisdiction, which made any further proceedings impossible because the Court itself had no jurisdiction to act on the matter, in relation to the City of Henderson et al. acting for the State of

Nevada who would no longer be properly before the Court. Where this Court's mandate in Huffman, supra, is clear and is not being followed, a writ of mandamus is proper to require that such duty must be performed. See Connor v. Coleman, supra, 425 U.S. 675, at 678. See also Huffman v. Pursue, Ltd., supra, Brennan's dissent at footnote 1.

The following two substantial Federal Questions [set forth as Questions I and II in Petition No 93-1969 for Writ of Mandamus] have already been presented to the Respondent Court of Appeal in a Petition for Rehearing by the City of Henderson et al. as to that Court's May 4, 1994 Memorandum:

Question I:

> Whether, the Huffman abstention doctrine is to be applied differently from other abstention doctrines; that is, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), must the United States District Court defer to the state court judicial system and dismiss for lack of subject matter jurisdiction the federal civil rights action of a State of Nevada citizen which seeks to enjoin enforcement of a quasi-judicial order of the Henderson City

Council, sitting as a hearing board for the State of Nevada; which revoked the federal plaintiffs' business license to do business in Henderson, Nevada, based on the City Council's finding of a fraudulent business license application; which order was pending in the state system and had been issued and served, but stayed for 10 days to permit an appeal to the Nevada State District Court; during which stay the Nevada citizen filed a civil rights lawsuit for an injunction under 42 U.S.C. Section 1983 in which the federal plaintiffs did not make any effort to plead and prove the requisite "extraordinary circumstances," nor did the United States District Court require that said issue be considered; the lack of which the City of Henderson pleaded as a defense on a motion to dismiss for lack of subject matter jurisdiction under the Eleventh Amendment and this Court's abstention ruling in Huffman, supra.

Question II:

Whether an Opinion expressing a unanimous decision of the Court of Appeals for the Ninth Circuit:

(1) that the principles of law expressed by Chief Justice Rehnquist in Huffman v. Pursue, Ltd. control and that the abstention doctrine applies to the facts set forth; and

(2) that the federal plaintiffs have not stated a cause of action which establishes subject matter jurisdiction for a federal injunction under 42 U.S.C. Section 1983; and

(3) that the cause of action must be dismissed for lack of subject matter jurisdiction; and

(4) in which the Court has made findings of fact and conclusions of law and entered a Judgment thereon, in a written Opinion which the Court has certified for publication as meeting the federal standards set

> forth in Rule 36 of the Federal Rules of Appellate Procedure and which has been published as 8 F.3d 1348 (CA 9, 1993);

may thereafter be withdrawn by the Court without providing a good and lawful reason?

(See copy of the City of Henderson Petition for Rehearing, attached hereto as Exhibit 1B to this Application). Real Parties in Interest Nevada Entertainment Industries, Inc. et al. were granted an extension of time in which to file its Petition for Rehearing up to and including June 21, 1994, and filed their Petition for Rehearing in the Ninth Circuit Court of Appeals on or about June 17, 1994.

Question 1 and Question 2 of the Petition for Writ of Mandamus, raise the important question as to the real meaning of the term "lack of subject matter jurisdiction" as that term has "meaning" in relation to the Huffman abstention doctrine. It presents a substantial federal constitutional question, not heretofore considered, which is "ripe" and should be resolved by this Court

immediately, because:

(1) it is the center of a major on-going controversy between United States District Court and United States Circuit Court Judges in the Ninth Circuit, and elsewhere. See Huffman v. Pursue, Ltd., supra (Brennan dissenting, at footnote 1);

(2) is the central issue in both the City of Henderson's cross-appeal now before the Ninth Circuit Court of Appeals on the City's Petition for a Rehearing and the City of Henderson's present Petition for Writ of Mandamus, culminating four years of continuing litigation on this issue; and

(3) the record below is simple and short, the issues before this Court on this Petition for Mandamus are squarely drawn by the action which was taken by the Ninth Circuit on April 7, 1994 and May 4, 1994, and are "ripe" for review by this Court pursuant to the Petition for Writ of Mandamus herein.

Questions 1 presents a substantial

federal question as to a controversy before the federal judges at both the trial court and appellate court levels in relation to the real meaning of the Huffman doctrine. That conflict was drawn in focus by the concurring opinion of Associate Justice Kennedy then sitting as a Circuit Judge in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 at 1081 (CA 9, 1989) (Kennedy concurring opinion). Petitioner City of Henderson et al. in its Petition for Writ of Mandamus on that Question contends that Justice Kennedy's interpretation is correct and is the underlying issue in its Petition for Writ of Mandamus, and is the issue which was raised by Justice Brennan in his dissent in 420 U.S. 612, at footnote 1; namely, that in those cases in which the Huffman abstention doctrine applies, and dismissal is mandated, the dismissal is and can be based on one ground only because of its historical basis -- lack of subject matter jurisdiction, meaning the

federal court has determined that it has no jurisdiction over the action before it (because jurisdiction over the matter resides in the State Court under the Eleventh Amendment to the United States Supreme Constitution), and the "person" of the City of Henderson et al. acting for the State of Nevada, brought before the federal court, is no longer properly before the federal court. Further, it is eminently clear that the "subject matter jurisdiction" issue has never been waived by the City of Henderson in its four years of litigation and should be answered by the Court of Appeals on the Petition for Writ of Mandamus herein. That issue is now squarely before the Court of Appeals on the City of Henderson et al.'s Petition for Rehearing.

On May 16, 1994, two days prior to the filing of moving parties' First Petition for Rehearing, this Court filed its opinion in Kokkonen v. Guardian Life Ins. Co. of America, supra. In Kokkonen,

supra, this Court issued a unanimous opinion of the Court on the effect of lack of "subject matter jurisdiction," holding that subject matter jurisdiction is not to be presumed, and a federal district court must dismiss a complaint unless there is some independent basis for federal jurisdiction, and the burden to establish that there is a basis for federal jurisdiction is on the federal plaintiff, stating at B1727:

> "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see Willy v. Coastal Corp., 503 U.S. ___ (1992) (slip op., at 4-5); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree, American Fire & Casualty Co. V. Finn, 341 U.S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, Turner v. President of Bank of North-America, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182-183 (1936)."

As a result of the Ninth Circuit Court of Appeals' November 2, 1993 Opinion and Judgment, "subject matter jurisdiction"

now has "two heads" in this appeal.

The United States Supreme Court's rationale and holdings in the Kokkonen case is relevant on two issues involving the legal concept "subject matter jurisdiction" as it applies in this case:

(1) whether, in view of the City of Henderson's claim that Huffman v. Pursue, Ltd. was controlling, the federal district court had "subject matter jurisdiction" at the outset;

(2) whether, in view of the Ninth Circuit Court of Appeals' finding that Huffman v. Pursue, Ltd., was controlling precedent, that Court exhausted its subject matter jurisdiction when it published its November 2, 1993 Opinion and filed its November 2, 1993 judgment.

The holding in Kokkonen reinforces this Court's prior decisions that absent some independent basis for federal jurisdiction, a federal court lacks the power [i.e. lacks subject matter

jurisdiction"] to either enforce or enjoin a state judgment. In this case a judgment of license revocation was issued by a state quasi-judicial administrative body, which judgment was subject to judicial review within the state court system. Since "extraordinary circumstances" were absent, the federal court lacked "subject matter jurisdiction" over this state decision, and could not lawfully conduct a review of the state proceedings, nor enjoin enforcement of the state judgment. The federal court should have abstained in this case under the Huffman doctrine.

The request for an order to show cause is also being brought for the purpose of calling this Court's attention to the ripeness of the issue and the Eleventh Amendment violation, so that this Court may consider whether it may wish to act to assume appellate jurisdiction of the substantial federal constitutional questions which are the subject of the Petition for Writ of Mandate, before the

end of the 1993 October Term.

The Eleventh Amendment protects important State Rights against undue interference by the exercise of federal judicial power. No "extraordinary circumstances" existed here which warranted federal interference with on-going state proceedings. Determination as to whether the Eleventh Amendment is implicated depends upon whether "the relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do." See Louisiana v. Jumel, 107 U.S. 711, at 721 (1883). Here, the State of Nevada controls the manner in which state administrative decisions, judicial in nature, will be reviewed by the state judicial system, and the manner in which said decisions ultimately become "final" and "enforceable." This federal

action was brought to specifically thwart the right of the State of Nevada to control judicial review of the quasi-judicial license revocation decision. The federal action violates the Eleventh Amendment, because it was directed at subverting the manner, under Nevada law, in which state decisions (1) are subject to judicial review, and (2) ripen into enforceable final state judgments, if judicial review is not sought.

Review by this Court of the matters raised by the Petition is urgently requested by the City of Henderson, et al., acting for the State of Nevada, because the Federal Court Injunction [enjoining a lawful state judgment and the Petitioners from the performance of lawful duties imposed by State law] -- a clear Eleventh Amendment violation -- has been in existence for four years and currently remains in force pending disposition of this case. Counsel for Petitioners has

contacted Counsel of Record for Real Parties in Interest, who has indicated that he does not oppose Petitioners' request herein for an order to show cause.

This Court will end its 1993 October Term in about two weeks (on or about June 30, 1994). The Briefs in Opposition will not be due until 30 days after Respondents receipt of the Petition, and the Petition for Writ of Mandamus on file herein will not be distributed to the Court by the Clerk until receipt of such brief in opposition, which will in all likelihood occur after the Court has ended its Term.

The Petition for a Writ of Mandamus of the United States Supreme Court was previously filed by Express Mail posted on June 3, 1994, and is now known as No. 93-1969. Service of the Motion herein on the Respondent Court and on Counsel of Record for Real Parties in Interest was made by Express Mail posted on June 21,

1994.

Dated: June 21, 1994

Respectfully submitted,

_____

James J. Clancy
Counsel of Record
for Petitioners

APPENDIX 8

CITY OF HENDERSON TRANSMITTAL LETTER, DATED JUNE 25, 1994, TO THE CLERK OF THE U.S. SUPREME COURT TOGETHER WITH AN APPLICATION TO BE SUBMITTED TO ASSOCIATE JUSTICE ANTHONY M. KENNEDY, AFTER DENIAL OF SAME BY ASSOCIATE JUSTICE O'CONNOR ON JUNE 15, 1994 AND A MEMORANDUM OF LAW FOR JUSTICE KENNEDY RE "USURPATION OF JUDICIAL POWER" AND "JUDICIAL DISCRETION".

(Reference: Supplemental Brief at page 6.)

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(818) 352-2069
Fax (818) 352-6549

June 25, 1994

Mr. William K. Suter
Clerk, United States Supreme Court
United States Supreme Court Building
1 First Street N.E.
Washington, D.C. 20543

Attention: Mr. Lorson

Re: Filing of Amended Application for: (1) Ex parte Order to Show Cause and (2) an Ex parte Order Advancing the Date Set for the Filing of Briefs in Opposition to Petition for Writ of Mandamus, in In Re City of Henderson, a Nevada Corporation, and James Goff, Chief of Police of the City of Henderson v. Nevada Entertainment Industries, Inc. a Nevada Corporation and Daniel Bishop, Real Parties in Interest, October Term 1993, No. 93-1969.

Dear Mr. Lorson:

Pursuant to United States Supreme Court Rules, Rule 22.5, and our telephone conversation on Thursday, June 23, 1994 (0700 a.m. Los Angeles time), I am transmitting an original and two copies of an Application to be submitted to Associate Justice Anthony M. Kennedy, after denial of the same by Associate Justice Sandra Day O'Connor on June 15, 1994.

I am also transmitting 13 copies of the cover sheet and page 1 (amended) of the Application to Justice Kennedy with a request that the 13 copies of the pleading which were transmitted to the Clerk's

Office by letter dated June 21, 1994 (with a request that the same be filed with the Court as a whole -- which under your telephonic ruling on June 23rd is not provided for in the rules) be conformed to the above described new Application to Associate Justice Anthony M. Kennedy, by substituting (1) a new cover sheet showing the pleading to be an Application to a single justice rather than a Motion to the Court, and (2) page 1 (amended) of the Application to Justice Kennedy for page 1 of the Motion to the Court.

I am also transmitting 13 copies of an additional legal memorandum based upon an authority which was published subsequent to the first submission to Associate Justice O'Connor.

The original certificate of service for said documents is enclosed with this letter.

Once said documents have been filed, please conform the enclosed face-sheet, and return them to our office in the enclosed stamped, self-addressed envelope.

Sincerely,

James J. Clancy
Counsel for Petitioners

JJC/cc
encl.

No. 93-1969

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

IN RE CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,
PETITIONERS
v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION
AND DANIEL BISHOP,
REAL PARTIES IN INTEREST

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE HON. JAMES R. BROWNING, AND WILLIAM C. CANBY, JR., CIRCUIT JUDGES, AND ROBERT J. KELLEHER, SENIOR DISTRICT JUDGE SITTING BY DESIGNATION

AMENDED APPLICATION FOR: (1) EX PARTE ORDER TO SHOW CAUSE AND (2) AN EX PARTE ORDER ADVANCING THE DATE SET FOR THE FILING OF BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE ANTHONY M. KENNEDY, CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Petitioners City of Henderson, a Nevada Municipal Corporation, and James Goff, Chief of Police of the City of Henderson, Nevada, through their

counsel of record, respectfully move the Court for an ex parte order requiring the respondent Ninth Circuit Court of Appeals to reinstate its November 2, 1993 Opinion (see copy at Exhibit 2 to this Application), and vacate the federal injunction which for the past 4 years has prevented the execution of a valid Nevada quasi-judicial license revocation order, or show cause on a date certain before the end of the 1993 Term why it should not be

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

IN RE CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,
PETITIONERS
v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,
REAL PARTIES IN INTEREST

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE HON. JAMES R. BROWNING, AND WILLIAM C. CANBY, JR., CIRCUIT JUDGES, AND ROBERT J. KELLEHER, SENIOR DISTRICT JUDGE SITTING BY DESIGNATION

MEMORANDUM OF LAW FILED IN CONNECTION WITH AMENDED APPLICATION FOR: (1) EX PARTE ORDER TO SHOW CAUSE AND (2) AN EX PARTE ORDER ADVANCING THE DATE SET FOR THE FILING OF BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

On Wednesday, June 22, 1994, counsel of record for the City of Henderson received in the mail the advance sheets containing the Eighth Circuit Court of Appeals decision in In re Prairie Island Dakota Sioux, Petitioners and Appellees v.

Prairie Island Dakota Sioux, dba Treasure Island Casino and Bingo, et al., Appellants, 21 F.3d 302-305 (CA 8, April 12, 1994), which the opinion characterized as an appeal from a remand order, which was reviewable under the appellant's petition for writ of mandate. The Prairie Island Dakota Sioux case, which involved the issue of lack of "subject matter jurisdiction," provides a vehicle for making a comparative analysis of the City of Henderson case now before this Court, by illustrating the difference between a judicial decision (Prairie Island) which avoids a "lack of subject matter jurisdiction" challenge, but is proper because within the Court's discretion, and the Ninth Circuit Court of Appeals decision below, which is arbitrary and capricious and a usurpation of judicial power in its refusal to articulate any reasonable basis or argument which would suggest that the Court possesses a

"discretion" to exercise federal jurisdiction in the face of the City of Henderson's challenge of "lack of primary subject matter jurisdiciton" as an absolute stricture on the Court.

In the Prairie Island case, Plaintiffs sued defendants, including a recognized Indian tribe and various tribal officers, in state court for alleged violations of Title VII, the Minnesota Human Rights Act and Minnesota law. Pursuant to 28 U.S.C. Section 1441, defendants removed the action to federal court. Realizing that an Indian tribe may not be sued under Title VII, plaintiffs moved to amend their complaint to delete the federal law claims. Concomitantly, Defendant Tribe moved to dismiss on grounds that the district court lacked "subject matter jurisdiction" because the tribe had not waived its sovereign immunity. Judge Alsop avoided the Tribe's defensive motion (claim of lack of subject matter jurisdiction based upon

sovereignty) by exercising the "discretion" which was given him under the trial facts (to act upon the respective motions of plaintiffs and defendants). After granting the plaintiffs' motion to amend the complaint, the district court held that it no longer had federal question jurisdiction. The court elected not to exercise its supplemental jurisdiction and remanded the case (without ruling upon the Tribe's defensive claim of lack of subject matter jurisdiction) based on 28 U.S.C. Section 1367(c) and Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed. 2d 720 (1988).

In analyzing the defendant tribe's Petition for Writ of Mandamus, the Court of Appeals stated broadly:

> "This court will issue a writ of mandamus, pursuant to the All Writs Act, 28 U.S.C. Section 1651, when it finds that there is no other adequate means to obtain relief and that the district court's order is a clear abuse of discretion, or usurpation of judicial power. In re Shalala, 996 F.2d 962, 964 (8th Cir. 1993)...."

(Our Emphasis.)

Thereafter, the Court of Appeals noted that the issue before the Court of Appeals was abuse of discretion (rather than usurpation of judicial power, as herein below), and held that the District Court had acted within its discretion.

In the Prairie Island case, United States District Court Judge Donald Alsop had a true "option" which just does not exist in the record below. Unlike Prairie Island, neither the United States District Court nor the Ninth Circuit Court of Appeals had any "discretion" which would permit the federal court to exercise "federal" jurisdiction in the City of Henderson case.

In the words of the Eighth Circuit Court of Appeals, at 304:

> "This Court will issue a writ of mandamus, pursuant to the All Writs Act, 28 U.S.C. Section 1651, when it finds that there is no other adequate means to obtain relief and that the district court's order is a clear abuse of discretion or usurpation of judicial power." (Our Emphasis.)

Neither Court had a "discretion" to review the evidence re fraud in the State hearing which provided the foundation for their application of the clean hands doctrine and dismissal on that basis. Both the District Court's and the Ninth Circuit Court of Appeals' opinions provide clear proof of usurpation of judicial power. See the Huffman doctrine [Huffman v. Pursue, Ltd., 420 U.S. 592 (1975): federal court must abstain from intervening in on-going state proceeding, judicial in nature, where right of judicial review exists in state court]; the Eleventh Amendment to the United States Constitution [an attack on valid state decisions, which seeks to use the lower federal court to enjoin lawful on-going state proceedings, judicial in nature, absent "extraordinary circumstances," is a direct attack on the state judicial system, and implicates the State as defendant, since the State alone controls the administration of its own

judicial system as one of the elements of its nature as Sovereign]; and the Rooker-Feldman doctrine [Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983): lower federal courts possess no power whatsoever to sit in direct review of state decisions which are judicial in nature; a United States District Court has no authority (i.e. "lacks subject matter jurisdiction") to review final state judicial judgments, and federal plaintiffs cannot challenge in federal court a final state decision arising out of proceedings which are judicial in nature, even if those challenges allege that the state tribunal's action was unconstitutional]; see also University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed. 2d 635, 106 S.Ct. 3220 (1986) [in action brought under 42 U.S.C. Section 1983, federal courts must give state administrative tribunals' factfinding the same preclusive

effect to which it would be entitled in State court.]

In the City of Henderson case, the "subject matter" [i.e. right to control an on-going state license revocation proceeding, judicial in nature, which was subject to full judicial review in the Nevada state court system, and which was "en train" at the time the federal complaint was filed] has been firmly committed to the state as an aspect of its sovereignty which cannot be waived. Both federal courts [the United States District Court for the District of Nevada and the United States Court of Appeals for the Ninth Circuit] were compelled to dismiss the federal action brought under 42 U.S.C. Section 1983 by the federal plaintiffs in the City of Henderson case, for lack of "primary" subject matter jurisdiction. Dismissal is mandated by the primary "subject matter jurisdiction" Constitutional interests underlying the Eleventh Amendment, and for the rationale

expressed in: the Rooker-Feldman doctrine, supra; University of Tennesee v. Elliott, supra; and Huffman v. Pursue, Ltd., supra, which protect and maintain the delicate balance surrounding the relationship between the judicial systems of the federal government and the 50 states.

The In re Prairie Island Dakota Sioux trial facts presented United States District Court Judge Alsop with an option. The civil lawsuit which was before him had been lawfully removed to the federal court and contained both federal and state issues. Under the trial court's analysis, plaintiff's motion to amend the complaint by deleting the federal issues, if granted, would remove the federal question and leave only the state issues for the federal court's resolution. Defendant's plea of sovereignty, could be viewed as "operating" essentially as a party's possible defense to a cause of action and was "not of the same character as subject

matter jurisdiction" in that (1) tribal sovereign immunity may be waived in certain circumstances" and is subject to the plenary power of Congress"; and (2) "Finally, a waiver of sovereign immunity cannot extend a court's "subject matter jurisdiction." The trial facts presented the trial court with an easy "out" -- an "option" which made his ruling unappealable, and not a proper subject for a writ of mandate. By electing to grant the plaintiff's motion to amend out the federal claim (which was within the trial court's discretion) the trial court was left with only the state issues, which permitted him to remand the lawsuit to the state court without the need to rule upon the defendant's challenge of lack of subject matter jurisdiciton based upon "sovereignty."

In the federal civil rights action brought by Nevada Entertainment Industries, Inc. et al. (hereinafter "Nevada Entertainment"), no such "option"

existed at either the trial level or in the Court of Appeals [neither Court had the "power" to review the evidence which was before the City Council], and the actions of both Courts (which did, in fact, review such evidence) are clear examples of "usurpations of judicial power."

Nevada Entertainment's civil rights action for an injunction to enjoin enforcement of the City Council's quasi-judicial order under 42 U.S.C. Section 1983 was filed during the 10 day period in which Nevada Entertainment had a right to appeal the quasi-judicial findings of fact to the Nevada District Court, and was filed for the specific purpose of enjoining the quasi-judicial findings of fraud and collaterally attacking that state of Nevada fact finding. Under the principles underpinning the Rooker-Feldman doctrine and University of Tennesee v. Elliott, supra, the United States District Court

clearly lacked subject matter jurisdiction of that issue. Under federal law, the lower federal court lacked the power to act upon these trial facts. Further, when the City correctly raised the Huffman doctrine as an absolute defense, the federal District Court similarly was mandated to dismiss the 42 U.S.C. Section 1983 suit for injunction unless Nevada Entertainment went to heightened pleadings and showed extraordinary circumstances under the Huffman doctrine. Because the Huffman doctrine applied, the standard "test" for granting an injunction in such cases no longer was applicable -- yet the trial court and the Court of Appeals have totally disregarded that fact and have issued injunctions which the federal system has wrongfully continued for four years.

In the face of the Rooker-Feldman, University of Tennesee v. Elliott, and Huffman challenges, the United States District Court at the outset gave Nevada

Entertainment everything it asked for -- a federal injunction and the right to do business for four years as against the sovereign right of the State of Nevada's judicial system which had already ruled to the contrary -- a clear usurpation of the state's judicial power.

The United States District Court in Nevada did not possess United States District Court Judge Alsoop's option. When the matter got to trial and the United States District Court finally discovered its error (when the City of Henderson added its additional pleas of res judicata and collateral estoppel), it clearly lacked the power to do what it did -- i.e. reexamine the City Council's finding of fraud [in clear violation of the principles underpinning the Rooker-Feldman doctrine and University of Tenn. v. Elliott, supra], and find the City Council's determination to be proper and dismiss the lawsuit on the grounds of the clean hands equity maxim.

The Ninth Circuit faced the same problem. Having found in its November 2, 1993 opinion and judgment, as a conclusion of law, that both the Huffman and Rooker-Feldman doctrines applied, as a matter of ultimate fact -- only one additional logical conclusion of law could follow -- that the Court also lacked "subject matter jurisdiction." What is more remarkable, the Ninth Circuit Court of Appeal thereafter refused to address the inescapable conclusion of law that followed from its own conclusion of law (that the Huffman Doctrine controlled this appeal), and repeated the same usurpation of the State's judicial power that was exemplified in the United States District Court's opinion.

This application for an "order to show cause" (and the petition for writ of mandamus on this Court's Docket in 93-1969) clearly established a right in the City of Henderson to the issuance of an order to show cause why all of the

above does not establish a prima facie case of "usurpation of judicial power" under the principles re burden of proof, etc., expressed in this Court's recent deliberation in Kokkonen v. Guardian Life Ins. Co. of America ___ U.S. ___ (1994), CCH S.Ct. Bulletin B1724 (1994). Since (as the Chief Deputy Clerk has ruled) the provisions of the United States Supreme Court Rules regarding an application for an extraordinary writ of mandamus do not permit the filing of a direct motion to the full court for an order to show cause why the federal Court's wrongful injunctions (which have eminated from both federal Courts) should not be vacated forthwith, it would appear that an application for such a "show cause order" to a single justice is just and proper under the instant fact -- the absolute refusal of the Court of Appeals to articulate any reasonable basis which would suggest that, in this case, it had a "discretion" to exercise federal

jurisdiction in the face of the contrary Rules of Law expressed by this Court in the above cases.

Dated: June 25, 1994

Respectfully submitted,

_____

James J. Clancy

APPENDIX 9

ORDER OF COURT OF APPEALS FOR THE NINTH CIRCUIT, IN CASE NO. 92-17054, 93-15052, DENYING THE PETITION FOR REHEARING OF NEVADA ENTERTAINMENT AND DENYING BOTH THE CITY OF HENDERSON'S MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING AND ITS MOTION FOR ORDER STAYING THE MANDATE.

(Reference: Supplemental Brief at page 6.)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,	)
Plaintiffs/Appellants/ Cross-Appellees,	)
v.	)
CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,	)
Defendants/Appellees/ Cross-Appellants.	)

Nos. 92-17054
93-15052

D.C. No. CV-90-00264-LDG

FILED

JUL 11, 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: BROWNING and CANBY, Circuit Judges, KELLEHER,* Senior District Judge.

* The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

Nevada Entertainment's Petition for Rehearing is DENIED. The City of Henderson's Motion for Leave to File a Second Petition for Rehearing is DENIED. The City of Henderson's Motion for Order Staying the Mandate is DENIED.

APPENDIX 10

ORDER OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT, IN CASE NO. 92-17054, 93-15052, GRANTING NEVADA ENTERTAINMENTS MOTION TO STAY THE MANDATE PURSUANT TO RULE 41(b).

(Reference: Supplemental Brief at page 7.)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,	)
Plaintiffs/Appellants/ Cross-Appellees,	)
v.	)
CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,	)
Defendants/Appellees/ Cross-Appellants.	)

Nos. 92-17054
93-15052

D.C. No. CV-90-00264-LDG

FILED

JUL 25, 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: BROWNING, Circuit Judge.

Nevada Entertainment's motion to stay the mandate pursuant to Rule 41(b) is granted.

APPENDIX 11

CITY OF HENDERSON'S MOTION IN THE U.S. SUPREME COURT FOR ORDER EXTENDING STAY OF MANDAMUS; DECLARATION OF JAMES J. CLANCY AND JOINT STIPULATION OF PARTIES AND MEMORANDUM OF POINTS AND AUTHORITIES, FILED AUGUST 12, 1994.

(Reference: Supplemental Brief at page 7.)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs/Appellants, and Cross-Appellees vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants/Appellees, and Cross-Appellants	) No. 92-17054) No. 93-15052)) [D.C. NO.) CV-S-90-264-) LDG-LRL]

APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF NEVADA

HONORABLE LLOYD D. GEORGE, DISTRICT JUDGE

MOTION FOR ORDER EXTENDING
STAY OF MANDATE;
DECLARATION OF JAMES J. CLANCY;
JOINT STIPULATION OF PARTIES;
MEMORANDUM OF POINTS & AUTHORITIES

JAMES J. CLANCY, ESQ.
9055 La Tuna Canyon Road
Sun Valley, Ca. 91352
For Defendants/Appellees
and Cross-Appellants

ROGER JON DIAMOND, ESQ.
2115 Main Street
Santa Monica, Ca. 90405
For Plaintiffs/Appellants
and Cross-Appellants

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP	No. 92-17054 No. 93-15052
Plaintiffs/Appellants, and Cross-Appellees	D.C. NO. CV-S-90-264-LDG-LRL
vs.	
CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,	
Defendants/Appellees, and Cross-Appellants	

MOTION FOR ORDER
EXTENDING STAY OF MANDATE

Plaintiffs - Appellants, Cross-Appellees Nevada Entertainment Industries, Inc., and Daniel Bishop (hereinafter "Nevada Entertainment"), and Defendants - Appellees, and Cross- Appellants City of Henderson and James Goff (hereinafter "City of Henderson") jointly move this Honorable Court for an order pursuant to

Federal Rules of Appellate Procedure (hereinafter "FRAP") Rule 41(b) extending the stay of mandate in the above-captioned case until final disposition by the United States Supreme Court of the City of Henderson's Petition for Writ of Mandamus (or Certiorari Under Rule 11), which is currently scheduled to be considered by the United States Supreme Court on September 26, 1994, or until final disposition by the United States Supreme Court of Nevada Entertainment's Petition for Writ of Certiorari (which must be filed by October 9, 1994), whichever is later.

This motion is jointly submitted by Nevada Entertainment and the City of Henderson, each of whom requests that the Mandate be stayed.

This motion is based upon the attached declaration of James J. Clancy, the Joint Stipulation of the Parties, and

Memorandum of Points & Authorities.

Respectfully submitted,

Roger Jon Diamond
For Plaintiffs/Appellants,
and Cross-Appellants

James J. Clancy
For Defendants/Appellees,
and Cross-Appellants

DECLARATION OF JAMES J. CLANCY

I, JAMES J. CLANCY, declare as follows:

1. On July 25, 1994, this Court granted Nevada Entertainment's motion to stay its mandate pursuant to Rule 41(b).

2. Cause exists to extend this Court's stay of mandate beyond the usual 30 day period, for the following reasons:

On or about June 2, 1994, the City of Henderson filed its Petition for Writ of Mandamus (or Certiorari Under Rule 11) with the United States Supreme Court, No.

93-1969. I have been informed by the Office of the Clerk of the United States Supreme Court that the City of Henderson's Petition is scheduled to be considered by the full Court on September 26, 1994, and in the interest of justice request that this Court extend its stay of mandate until final disposition of the City's Petition.

Nevada Entertainment has indicated in papers filed with this Court that it intends to file a timely Petition for Writ of Certiorari with the United States Supreme Court. Mr. Diamond, Counsel for Nevada Entertainment, has advised me that he also wishes the Court to extend its stay of mandate until final disposition of the City's Petition.

Unless this Court extends its stay of mandate:

(a) the City may be forced to file a duplicate Petition for Certiorari Under Rule 10, in order to preserve the issues raised by the City of

Henderson's Petition for Writ of Mandamus (or Certiorari under Rule 11) for presentation to the United States Supreme Court. This is unnecessarily redundant and wasteful of judicial resources; and

(b) papers on file with this Court state that the issues which Nevada Entertainment intends to raise in its Petition for Writ of Certiorari will be rendered moot.

3. Since both sides want the Court to stay its mandate, there appears to be no reason why this Court should not do so.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of August, 1994, at Sun Valley, California.

_____

JAMES J. CLANCY

JOINT STIPULATION OF THE PARTIES

1. Plaintiffs - Appellants, Cross-Appellees Nevada Entertainment

Industries, Inc., and Daniel Bishop (hereinafter "Nevada Entertainment"), and Defendants - Appellees, and Cross-Appellants City of Henderson and James Goff (hereinafter "City of Henderson"), hereby stipulate, agree, and jointly move this Honorable Court for an order pursuant to Federal Rules of Appellate Procedure (hereinafter "FRAP") Rule 41(b) extending the Court's stay of its mandate in the above-captioned case until final disposition by the United States Supreme Court of the City of Henderson's Petition for Writ of Mandamus (or Certiorari Under Rule 11), No. 93-1969, which is currently scheduled to be considered by the United States Supreme Court on September 26, 1994, or until final disposition by the United States Supreme Court of Nevada Entertainment's Petition for Writ of Certiorari (which must be filed by October 9, 1994), whichever is later.

2. This request is not frivolous, and is not filed for the purposes of

delay, but is made in good faith, so that:

(a) Nevada Entertainment has adequate time in which to file a timely Petition for Certiorari, and

(b) the United States Supreme Court has adequate time in which to dispose of the City of Henderson's Petition for Writ of Mandamus (or Certiorari Under Rule 11), currently scheduled to be considered by the United States Supreme Court on September 26, 1994, without the necessity of refiling a Petition for Certiorari under Rule 10 of the United States Supreme Court Rules, raising the same jurisdictional issues as are presented by the City of Henderson's Petition which presently is pending before the Court.

Dated: August ___, 1994

_____

Roger Jon Diamond, Esq.
For Plaintiffs -
Appellants, and
Cross-Appellees

Dated: August ___, 1994

James J. Clancy
For Defendants - Appellees, and Cross-Appellants

MEMORANDUM OF POINTS AND AUTHORITIES

This Court granted a stay of the mandate on July 11, and has the power to extend the stay period beyond 30 days, where cause exists. See FRAP, Rule 41(b), which states in relevant part:

> "A stay of the mandate....shall not exceed 30 days unless the period is extended for cause shown."

Good cause exists for an extension of the stay of mandate. The purpose of the stay provision of Rule 41(b) is to allow further review of the case in the United States Supreme Court. There is presently pending before the United States Supreme Court a Petition for Writ of Mandamus (or Certiorari Under Rule 11), No. 93-1969, filed by the City of Henderson. The

rationale behind Rule 41 would be advanced by the granting of an extension of the stay of mandate in the above-captioned case until final disposition by the United States Supreme Court of the City of Henderson's Petition for Writ of Mandamus (or Certiorari Under Rule 11), which is currently scheduled to be considered by the United States Supreme Court on September 26, 1994. See City of Henderson v. Nevada Entertainment Industries, 93-1969.

Nevada Entertainment has indicated it intends to file a timely Petition for Certiorari. United States Supreme Court Rule 13.1 states that a Petition for Certiorari must be filed within 90 days from the lower court's denial of a timely petition for rehearing. [This Court denied Nevada Entertainment's timely petition for rehearing on July 11, 1994. Therefore, Nevada Entertainment has until October 9, 1994 in which to file a timely Petition for Certiorari, and represents

that it is not able to file said Petition within the present 30-day stay period].

Both parties are of the opinion that there is a reasonable chance the Supreme Court may grant review in this case. Since both sides wish this Court to stay its mandate to allow the Supreme Court to review this matter, no prejudice would result from such a stay.

Accordingly, it is respectfully requested that this Court extend its stay of mandate pursuant to Rule 41(b) until final disposition by the United States Supreme Court of the City of Henderson's Petition for Writ of Mandamus (or Certiorari Under Rule 11), No. 93-1969, which is currently scheduled to be considered by the United States Supreme Court on September 26, 1994, or until final disposition by the United States Supreme Court of Nevada Entertainment's Petition for Writ of Certiorari (which must be filed by October 9, 1994).

whichever is later.

Respectfully submitted,

Roger Jon Diamond
For Plaintiffs/
Appellants, and
Cross-Appellants

James J. Clancy
For Defendants/
Appellees, and
Cross-Appellants

APPENDIX 12

ORDER OF COURT OF APPEALS FOR THE NINTH CIRCUIT, IN CASE NO. 92-17054, 93-15052, FILED AUGUST 24, 1994, GRANTING PARTIES JOINT MOTION FOR ORDER EXTENDING STAY OF MANDATE TO OCTOBER 12, 1994.

(Reference: Supplemental Brief at page 7.)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,

Plaintiffs/Appellants/ Cross-Appellees,

v.

CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,

Defendants/Appellees/ Cross-Appellants.

Nos. 92-17058
92-17093

D.C. No. CV-91-01268-LDG

FILED

NOV 26, 1993

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: BROWNING, Circuit Judge.

The parties' joint Motion for Order Extending Stay of Mandate is GRANTED. The mandate shall issue December 13, 1993. IT

during the period of the stay, the clerk of this court receives notice that Nevada Entertainment has filed a petition for certiorari with the Supreme Court, the stay shall continue until final disposition by the Supreme Court. See FRAP 41(b).

APPENDIX 13

ORDER OF COURT OF APPEALS FOR THE NINTH CIRCUIT, IN NO. 92-17054, 93-15052, INFORMING THE PARTIES THAT THE PANEL HAS VOTED TO REJECT THE SUGGESTION FOR REHEARING EN BANC AND THAT THE FULL COURT HAS BEEN ADVISED OF THE SUGGESTION FOR AN EN BANC REHEARING, AND NO JUDGE OF THE COURT HAS REQUESTED A VOTE ON THE SUGGESTION FOR REHEARING EN BANC, AND THE SUGGESTION FOR REHEARING IS REJECTED.

(Reference: Supplemental Brief at pages 9, 10.)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,	)
Plaintiffs/Appellants/ Cross-Appellees,	)
v.	)
CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,	)
Defendants/Appellees/ Cross-Appellants.	)

Nos. 92-17054
93-15052

D.C. No. CV-90-00264-LDG

FILED

MAY 11, 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: BROWNING and CANBY, Circuit Judges, KELLEHER,* Senior District Judge.

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* The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

The panel has voted to reject the suggestion for rehearing in banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The suggestion for rehearing en banc is rejected.